CLERK'S COPY.

166

85796
U. S. S. C.

Pat

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1938
CERTIORARI GRANTED APRIL 11, 1938

BLANK

PAGE

TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, Appellant,	)	
versus	)	No. 770
	)	IN EQUITY.
REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, Appellee.	)	

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.
M. NEIL ANDREWS, ESQ.,
Asst. United States Attorney, Atlanta, Ga.
M. H. EUSTACE, ESQ.,
Asst. Attorney General, Washington, D. C.

Solicitors for Appellant.

HAROLD HIRSCH, ESQ., MARION SMITH, ESQ.,
and M. E. KILPATRICK, ESQ.,
1045 Hurt Building, Atlanta, Ga.

Solicitors for Appellee.

BLANK

PAGE

INDEX

	Page
Bill of Complaint	1
Exhibit "E"	15
Amendment to Bill	18
Exhibit "F"	25
Exhibit "G"	38
Motion to dismiss bill 12-15-1934	71
Amendment to motion to dismiss	73
Motion to strike amendment to bill	74
Answer and return to rule nisi	75
Motion to dismiss bill 9-15-1936	116
Defendant's motion for findings of fact etc.	122
Order overruling motion to dismiss of 9-15-1936	143
Complainant's request for findings of fact	144
Complainant's request for conclusions of law	148
Findings of fact and conclusions of law	150
Final decree	157

Motion to reproduce parts of testimony in verbatim form and order 158

Statement of Evidence 161

Testimony of H. J. Stegeman for plaintiff .. 161
Testimony of Charles E. Martin for plaintiff 191
Testimony of Dr. A. H. Armstrong for plaintiff 197

Testimony of Dr. M. L. Brittain for plaintiff 224

Testimony of Dr. S. V. Sanford for plaintiff 228

Plaintiff's Exhibit 1 - Regulations and Guidance of undergraduate students 247

Plaintiff's Exhibit 2, Dept. of Athletics 251

Defendant's Exhibit 1 - Report of Tom Wisdom State Auditor 264

Plaintiff's Exhibit 5 - Regulation for Students .. 283

" " 4 - Foot Ball Ticket 289

" " 6 - Athletic Dept. School of Tech 290

Defendant's Exhibit 3 - Audit Ga. Tech Athletic Association 293

Plaintiff's Exhibit 8 - By Laws U. of Ga. Athletic Association 312

Plaintiff's Exhibit 9 - Excerpts from Minutes, Regents 318

Plaintiff's Exhibit 10 - Claim for refund of taxes 320

Plaintiff's Exhibit 11 - Letter from Comr. Int. Rev. 10-11-33 324

Plaintiff's Exhibit 12 - Letter from Comr. Int. Rev. 4-26-34 326

Defendant's Exhibit 2 - Application for Charter Ga. Tech. Ath. Assn. 330

Defendant's Exhibit 3 - Application for Charter U. of Ga. Ath. Assn. 336

Defendant's Exhibit 4 - Checks to J. D. Osborne 11-27-34 342

Defendant's Exhibit 5A - Checks to Collector of Int. Rev. 12-8-32 343

Defendant's Exhibit 5B - Checks to Collector Int. Rev. 11-29-32 343

Defendant's Exhibit 5C - Checks to Collector of Int. Rev. 11-14-32 343

Defendant's Exhibit 6A - Foot Ball Ticket 11-24-34 344

Defendant's Exhibit 6B - Foot Ball Ticket 9-29-34 345

Defendant's Exhibit 7 - List of Varsity foot ball players 345

Defendant's Exhibit 8 - Claim for refunds 348

Defendant's Exhibit 9 - Telegram Com'r Int. Rev. 349

Defendant's Exhibit 10 - Tax Return Oct. 1932 .. 351

Defendant's Exhibit 11 - Tax Return No. 1932 352

Defendant's Exhibit 12 - Tax Return prepared by Coll. for Sept. 1934 353

Defendant's Exhibit 13 - Tax Return prepared by Coll. for Oct. 1934 354

Defendant's Exhibit 14 - Tax Return prepared by Ga. Tech 355

Defendant's Exhibit 15 - Notice of Tax Lien U. of Ga. 10-24-34 358

Defendant's Exhibit 16 - Warrant for Distraint U. of Ga. 362

Defendant's Exhibit 17 - Notice of Levy U. of Ga. 365

Defendant's Exhibit 18 - Notice and demand for tax U. of Ga. 10-24-34 367

Defendant's Exhibit 19 - Second notice and demand for tax U. of Ga. 10-24-34 368

Defendant's Exhibit 20 - Notice of Tax Lien Ga. Tech Ath. Assn. 370

Defendant's Exhibit 21 - Warrant for Distraint Ga. Tech Ath. Assn. 372

Defendant's Exhibit 22 - Notice of Levy on Bank Deposits Ga. Tech 375

Defendant's Exhibit 23 - Notice and demand for tax Ga. Tech 10-24-34 377

Defendant's Exhibit 24 - Second Notice and demand for tax Ga. Tech 10-24-34 379

Defendant's Exhibit 25 - Bank account Chas. E. Martin, Trustee 381

Defendant's Exhibit 26 - Bank account Ga. Tech Ath. Assn. (C. & S.) 382

Defendant's Exhibit 27 - Bank account Ga. Tech Ath. Assn. 1st. Natl. 384

Defendant's Exhibit 28 - Check of Ath. Assn., U. of Ga. to Hamilton 386

Defendant's Exhibit 29 - Check of Ath. Assn., U. of Ga. to Western Union 387

Defendant's Exhibit 30 - Check of Ath. Assn., U. of Ga. to Seaboard R. R. 387

Order approving 390

Petition for appeal 391

Order granting appeal 392

Assignments of error 393

Praecipe 426

Order designating physical exhibits 427

Clerk's certificate 429

Proceedings in U. S. C. C. A., Fifth Circuit-- 431

Minute entry of argument and submission---- 431

Opinion, Sibley, J---------- 431

Dissenting opinion, Hutcheson, J---------- 439

Judgment---------- 446

Clerk's certificate---------- 446

Motion of appellee to have Marion H. Allen substituted for W. E. Page, deceased------ 447

Order to show cause on motion of appellee for substitution---------- 448

Marshal's return on motion to substitute----- 448

Notice and affidavit of Marion H. Allen in connection with motion of appellee to substitute him appellant---------- 449

Order substituting Marion H. Allen, Collector, etc., in place of W. E. Page, deceased----- 452

Clerk's certificate---------- 452

Stipulation and addition to record---------- 453

Opinion, Holmes, J., on former appeal--- 454

Dissenting opinion, Hutcheson, J-------- 461

Order allowing certiorari---------- 464

BLANK

PAGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA	)	
	)	NO. 770
v.	)	
	)	IN EQUITY.
W. E. PAGE, COLLECTOR OF INTERNAL REVENUE	)	

BILL OF COMPLAINT

TO THE HONORABLE, THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA:

The "Board of Regents of the University System of Georgia," a department of the State Government of Georgia, styled "Regents of the University System of Georgia," a corporation organized under the laws of the State of Georgia, brings this its bill of complaint against W. E. Page, Collector of Internal Revenue of Atlanta, Georgia, District, and respectfully shows:

1.

That complainant is a department of the State Government of Georgia, incorporated by the Act of the Georgia Legislature in the year 1931 (Georgia Laws, 1931, pps. 20-31).

2.

That the defendant herein, W. E. Page, is Collector of Internal Revenue of the Atlanta, Georgia, District, and is a citizen and resident of Atlanta, Georgia, in said Northern District of Georgia.

3.

That this suit involves an actual controversy between a department of the State of Georgia and the Collector of Internal Revenue of said Atlanta, Georgia, District with respect to an internal revenue measure of the United States, to-wit: The Revenue Act of 1926, Sec. 500 of said Act as amended by the Revenue Act of 1932, Sec. 711 (e).

4.

That two of the branches of the said University System of Georgia created by the said Act of the Georgia Legislature of 1931 are the University of Georgia, located at Athens, Georgia, and the School of Technology at Atlanta, Georgia, each of which is, and at all times herein mentioned have been operated under the supervision and control of the said Board of Regents.

5.

That the said University of Georgia and School of Technology each has a number of mere internal divisions or departments, such as mathematics, military, physics, chemistry and athletic departments, each of which exercises its part in the educational program, being duly authorized so to do by complainant herein.

6.

That each said branch through its said athletic department carries on and promotes as an integral part of its educational activities various physical training programs for its student body, including intercollegiate athletic contests with other colleges and universities in the South and elsewhere.

7.

That the physical training and education incident to said contests, as well as the contests themselves, are a part of the cirricula activities of the said branches of the University System of Georgia, carried out by said branches of the said department of government of the State of Georgia, with the consent and approval and under the direction of said Board of Regents.

8.

That the said athletic department of each of said branches of the University System of Georgia has collected, and is presently engaged in collecting, for complainant, to be by complainant used for said branch of the government of the State of Georgia in furthering and carrying on its said educational and governmental functions, admissions to its said intercollegiate athletic contests.

9.

That recently, to-wit: on the 24th day of October, 1934, defendant herein, through a duly authorized deputy collector, whose exact name is unknown, served upon Charles E. Martin, an employee of the University of Georgia, a warrant for distraint, a copy of which is hereto attached and marked Exhibit "A"

and made a part hereof, together with a notice of lien, copy of which is hereto attached as Exhibit "B", and two demands, copies of which are hereto attached and marked Exhibits "C" and "D", respectively, demanding payment from said Charles E. Martin the sum of Eight Hundred Ninety-Five Dollars and thirty-seven cents ($895.37), for certain alleged admission taxes allegedly due on account of admissions collected by said department, as above alleged, during the months of September and October, 1934.

10.

That the defendant likewise, through a duly authorized deputy, on October 25, 1934, served said warrant for distraint and a notice of levy, copy of which is hereto attached as Exhibit "E", upon the Trust Company of Georgia in Atlanta, Georgia, and the Citizens and Southern National Bank in Athens, Georgia, levying upon a certain account at the Trust Company of Georgia nominally in the name of "University of Georgia, Department of Athletics," to the extent of $895.37, and upon an account nominally under the name of "Charles Martin, Trustee," in the Citizens & Southern National Bank.

11.

That there is no such entity as "University of Georgia, Department of Athletics," said accounts so levied upon being so styled and carried for convenience only, but being the sole and exclusive property of complaintant herein.

12.

That the defendant likewise on October 25, 1934,

through a duly authorized deputy, served similar papers upon Doctor A. H. Armstrong, an employee of the School of Technology, and upon The First National Bank of Atlanta, demanding from the said A. H. Armstrong payment of the sum of Three Thousand Nine Hundred Fourteen Dollars and sixty-three cents ($3,914.63) as alleged admission taxes on account of admissions collected by said School of Technology during the months of September and October, 1934, as above alleged and levying upon an account in said bank belonging to complainant.

13.

That said warrants for distraint cover alleged taxes allegedly due from various individuals who paid admissions to said athletic contests, which taxes, however, said defendant is attempting to collect from said branches of the government of the State of Georgia.

14.

That the sums demanded by the defendant, and for which said distraints were levied, represent ten per cent (10%) of certain admissions so collected by said athletic departments or associations of said branches, the said sums so levied upon being the sole and exclusive property of complainant.

15.

That said warrants for distraint are proceeding illegally and contrary to law in that complainant herein and its said branches constitute a department of the government of the State of Georgia, engaged, as herein mentioned, in carrying out purely governmental functions incident to the government of the State of

Georgia, and as such in carrying out the said intercollegiate contests for which it charged and collected admissions was engaged in a purely governmental operation or function and is not and was not subject to taxation thereon, under the Revenue Acts of the United States, nor is nor was subject to any control or interference by the Federal Government nor any of its branches, including the Congress and the defendant.

16.

That the Act under which the defendant is proceeding provides as follows:

> * * * "On and after the date this title takes effect, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1924—
>
> "(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission; but where the amount paid for admission is 75 cents or less, no tax shall be imposed;"
> *Revenue Act of* 1926, *Sec.* 500 (*a*) (1)
>
> * * * "(b) No tax shall be levied under this title in respect of—(1) Any admissions all the proceeds of which inure (A) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any

city, town, village, or other municipality, or of maintaining a cooperative or community center moving-picture theatre—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual; or (B) exclusively to the benefit of persons in the military or naval forces of the United States; or (C) exclusively to the benefit of persons who have served in such forces and are in need; or (D) exclusively to the benefit of National Guard organizations, Reserve Officers' associations or organizations, posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private stockholder or individual; or (E) exclusively to the benefit of members of the police or fire department of any city, town, village, or other municipality, or the dependents or heirs of such members; or * * *

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States)."

Section 500 (*b*) (1) (*e*) *Revenue Act of* 1926, *as added by Section* 711 (*e*) *Revenue Act of* 1932.

17.

That a proper construction, interpretation and

enforcement of said Act would exempt from the operation thereof any and all branches or departments of the governments of the several States, including complainant.

18.

That the Commission of Internal Revenue has, however, construed said Act as being applicable to and enforceable against the departments of government of the several States, including complainant, the ruling of the Commissioner being published as "Informal Ruling No. 7" on July 28, 1932, as follows:

> "State universities must collect the tax on admissions to football games. The burden of the tax falls, not on the State, but on the persons paying the admission charges."

19.

That the defendant, who is in privity with the Commissioner of Internal Revenue, is seeking, under said Act, as herein alleged, and pursuant to the said ruling of the Commissioner of Internal Revenue to collect said sums from complainant representing alleged taxes of numerous individuals, contrary to the wishes of and forcibly against the will of complainant and its said various departments, although complainant's said branches, pursuant to instructions from complainant, have refused to and have not collected any tax for the defendant or for the Federal Government at any time, and although the tax liability, if it exists, is the liability of said numerous individuals.

20.

That complainant's said branch, the University of

Georgia, has, pursuant to complainant's instructions, placed the following notice upon each ticket so sold:

> "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax,"

the same notice, except for the name, School of Technology, appearing upon each ticket so sold by the School of Technology.

21.

That the said Act so construed by the Commissioner of Internal Revenue, and which the defendant is attempting forcibly and against the will of complainant and its several departments to carry out, as herein alleged, is unconstitutional, being violative to the Tenth Amendment to the Constitution of the United States, which provides that the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people, in that so construed it attributes to Congress a power not delegated to the United States by the Constitution nor prohibited by it to the States, namely, the power to control and carry out without any interference whatsoever its educational, governmental functions, which power is reserved to the respective States.

22.

That the complainant and its said departments are branches of the State Government of Georgia, and as such refuse to be burdened and cannot legally, against their will, be burdened with the duty of collecting taxes for the Federal Government, or for the defendant.

23.

That complainant has no remedy at law by paying said alleged taxes and suing to recover same, as under the Commissioner's interpretation of said Act the tax is imposed on the individual who attends such athletic contests, and if said tax be paid by complainant it will be irreparably damaged, as the amount so paid would be irrevocably lost in that claims for refund of internal revenue taxes paid are maintainable only by the person or corporation liable for the tax paid, and neither complainant nor its said branches is liable for such tax under the law and under the construction placed on said law by the Commissioner of Internal Revenue and the defendant. Were it possible under the law, moreover, for complainant through its said departments to pay the amount claimed by defendant and to prosecute a claim for refund therefor, such procedure would involve a multiplicity of suits since admissions are collected by complainant's said departments approximately nine out of every twelve months of each year.

24.

That the action of defendant is seeking, by distraint upon the property of complainant, to collect from complainant's said branches admission taxes allegedly due not from complainant or its said branches but from

various individuals, is contrary to law, in that collection of taxes by distraint is available only against the person against whom the tax is imposed and complainant is not such person.

25.

That said proceedings under said warrants for distraint and levies interfere with the proper operation of the government of the State of Georgia and prevents the use of complainant's said funds and should be restrained.

26.

That the circumstances involved, as herein alleged, whereby the defendant is attempting to collect from branches of complainant, departments of the government of the State of Georgia, taxes allegedly due from various individuals, for which there is no liability on complainant or its said department, are exceptional and extraordinary.

27.

That the State of Georgia, including complainant and its branches, is sovereign and independent in its sphere of governmental action and operation, as herein alleged, and is entitled in carrying out its said governmental functions to be exempt from such interference or control as is being attempted by the befendant, as herein alleged.

28.

That if an injunction does not issue as prayed for hereinafter, complainant will suffer irreparable injury and damage through the actions of defendant, his

agents, deputies, servants and employees, herein complained of and as further shown, complainant has no adequate remedy at law.

29.

That complainant, as a matter of protection to itself, has reserved and set aside ten per cent (10%) of the amount of all admissions so collected by its branches, and a part of this ten percent (10%) so set aside and deposited in banks represents the accounts on which the warrants for distraint hereinbefore referred to have been levied.

30.

That complainant, a department of the State of Georgia, has no intention of violating any law, State or Federal, and honestly desires that there be declared by this court the legal right and relations between the parties hereto involving the actual controversy hereinbefore alleged, this controversy arising each time an admission is collected by any of the various branches of complainant.

31.

That the individuals who paid admission to the said branches of complainant are not liable for any admission taxes thereon, in that the collection of said admissions is one means by which complainant, through said branches, receives revenue for the purpose of carrying out its said governmental functions, and any tax imposed upon individuals attending said athletic contests would constitute plain interference with and a burden upon the governmental functions of the State of Georgia.

WHEREFORE, complainant prays that this court, nder the provisions of the Act of Congress of June 14, 934, as set out in USCA, Title 28, section 400, declare hat complainant and its said departments, being ranches of the government of the State of Georgia, ngage in the matters herein alleged in purely govern- ental functions, are not liable for any admission axes by reason of the collection of admissions to said thletic contests, and are not required to collect any axes for the Federal Government or for the defendant y reason of said admissions so collected, and that he complainant and its said departments in the natters hereinbefore alleged are engaged in purely overnmental functions and are not subject to the nterference attempted by the defendant herein, and hat Section 500 (a) of the Revenue Act of 1926, s amended, properly construed does not apply to overnmental functions so carried on by complainant nd its branches, and that as construed and as sought o be enforced by the defendant against complainant, hat said Act is unconstitutional, being violative of he Tenth Amendment to the Constitution of the Jnited States, in that Congress has no power to tax he means or instrumentalities of nor to interfere with he governmental functions of the State of Georgia.

Complainant prays further, pending said declaration y the court, that the defendant, his agents, deputies, ervants and employees be enjoined ex parte and tem- orarily from proceeding further with said levies and varrants for distraint, or any other proceeding gainst complainant herein, or any of its departments, ith respect to alleged admissions taxes, complainant ereby offering to pay into court the said disputed

funds levied upon pending the declaration by this court of the legal relations of the parties involved and the final decree and order herein.

Complainant further prays that the injunction herein prayed for be made permanent upon the declaration by the court herein requested.

Complainant further prays that it have judgment against the defendant for costs herein, and that there be issued out of and under the seal of this Honorable Court a subpoena of the United States of America, directed to the said defendant, commanding him on a day certain to appear and make answer to this bill of complaint and prayer for declaration of rights and legal relations and to abide and perform all orders and decrees as may be herein made.

REGENTS OF THE UNIVERSITY
SYSTEM OF GEORGIA,
By Marion Smith, Complainant.
Chairman Board of Regents, University System of Georgia.

M. J. YEOMANS,
Attorney General, State of Georgia.

HAROLD HIRSCH & MARION SMITH
M. E. KILPATRICK,
Solicitors and Counsel for Complainant.

NOTE: Exhibits A, B, C, D, omitted here, same appear in the Statement of evidence beginning at page.....

EXHIBIT "E"

NOTICE OF LEVY

UNITED STATES OF AMERICA
.....Collection District,
State of GEORGIA

To **Trust Company of Georgia** (Name of person holding property, moneys, etc., belonging to taxpayer)
At **Atlanta, Georgia**

You are hereby notified that there is now due, owing, and unpaid from **University of Georgia Department of Athletics, Athens, Georgia** to the United States of America the sum of **Eight Hundred Ninety Five and 37/100 dollars ($895.37)** (Insert amount of tax, penalties, and interest due) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid **Univ. of Ga. Department of Athletics** (Insert name of taxpayer) and all sums of money owing from you to the said **Univ. of Ga. Department of Athletics (insert name of taxpayer)** are hereby siezed and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of **Eight Hundred Ninety Five and 37/100 dollars ($895.37)** (Insert amount of tax, penalties, and interest) of the amount now owing from you to said **Univ. of Ga. Department of Athletics** (Insert name of taxpayer) or for

such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at **Atlanta. Georgia** this **24th** day of **October 1934.**

(SGD) W. E. PAGE,
Collector of Internal Revenue

Service Acknowledged,
(Sgd.) Dameron Black, Vice-Pres.
10/25/34

U. S. Government Printing
Office: 1933 2-12503

GEORGIA:
FULTON COUNTY:

BEFORE ME, the undersigned attesting officer, personally appeared MARION SMITH, who, being duly sworn, on oath says:

That he is the Chairman of the Board of Regents of the University System of Georgia; that deponent has read the within and foregoing bill of complaint and that he is familiar with the facts alleged therein, and that as to those allegations as to which he has personal knowledge he knows them to be true, and as to the other allegations derived from information given him by others, he believes them to be true.

MARION SMITH.

Sworn to and subscribed before me,
this the 27th day of October, 1934.

M. E. GRACE,
Notary Public.
(NOTARIAL SEAL)

ORDER TO SHOW CAUSE

The foregoing bill of complaint of the Regents of the University System of Georgia, praying for a declaration of rights and legal relations between the parties and for an injunction ex parte and temporarily pending said declaration, being read and considered, the same is hereby sanctioned and ordered filed.

IT IS FURTHER ORDERED that subpoena issue as prayed and be served on the defendant, together with a copy of this bill of complaint and order, and that the defendant show cause before me, if any he has, at the United States Court House in Atlanta, Georgia, at 10 o'clock, A. M., on the 14th day of Nov., 1934, why an interlocutory injunction should not be granted as prayed, pending the declaration herein of the legal rights and relations of the parties with leave to move for an earlier restraining order should the necessity arise.

This the 9th day of Nov. 1934.

E. MARVIN UNDERWOOD,
UNITED STATES DISTRICT JUDGE.

Filed November 9th, 1934.

TITLE OMITTED.

AMENDMENT

TO THE HONORABLE, THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA:

COMES NOW the complainant in the above entitled cause and with leave of court amends its complaint heretofore filed, by adding the following paragraphs, to-wit:

32.

That the cirricula at both of its said branches, the

University of Georgia and the School of Technology, include departments of physical education; at the University of Georgia the various courses and activities which make up this department of physical education are selected by the faculty through a director of athletics under the direct control and supervision of the President of the University of Georgia and of a committee of faculty members appointed by the President of the University of Georgia.

(a) That the department of physical education is in charge of a number of professors and instructors of physical education.

(b) That the University of Georgia requires for all degrees for male students, except premedical and pharmacy degrees, two (2) years of physical education for all men who cannot qualify for R. O. T. C. training.

(c) The physical education program includes physical education courses, intermural athletics, interfraternal athletics and intercollegiate athletics. The intercollegiate athletic program composes golf, track, cross-country, tennis, swimming, basket ball, baseball, football and boxing, and at the University of Georgia during the year 1934, there was approximately thirty (30%) per cent. of the male students who participated in the intercollegiate athletic phase of the physical athletic program; there was an average of approximately thirty (30%) per cent. of the student body in addition to those competing in intercollegiate athletics who were participating in similar intermural and interfraternal athletic contests; during the year 1933-1934, the total number of students in intercollegiate, intermu-

ral and interfraternal athletics was approximately eighteen hundred fifty-eight (1858), this number being fairly constant every year and increasing with the attendance. Allowing for duplication in the various athletic events it is estimated that there are approximately seventy-five (75%) per cent. to eighty (80%) per cent. of the male students of the University of Georgia so engaged in some form of athletics or some form of physical education.

(d) All of these contests and activities are supervised and directed by the faculty of the University of Georgia and the said program is approved by complainant herein.

(e) Exhibit "F" hereto attached shows in detail the courses in physical education which form a part of the physical educational program, in addition to active intermural, interfraternal and intercollegiate athletics, said Exhibit "F" being a bulletin of the University of Georgia issued for the 1933-1934 term; further, the courses in physical education and the cirriculum leading to the degree of Bachelor of Science in physical education are shown in this same Exhibit "F"; attached hereto as Exhibit "G" is a similar bulletin of the University of Georgia showing on pages ten and eleven thereof similar information.

(f) The said program of physical education including intermural, interfraternal and intercollegiate athletics is constantly increasing in its scope of activity.

(g) That a similar program is in effect in the School of Technology and is similarly selected, supervised

and handled by the faculty of that branch with the approval of complainant, with approximately the same percentage of students engaging therein.

(h) That all students at both said branches of the complainant are required to pay an athletic fee each year, this amount being used to cover part of the expense of the athletic program, and to cover the remainder of the expense of the athletic and physical education program, the said branches are allowed by complainant to and actually do charge incidental admissions to the intercollegiate athletic contests. These funds so collected are the funds of complainant, but complainant allows the said branches to administer them for the sole benefit of the educational programs at said branches.

(i) That the benefit of said admissions inures wholly and exclusively to the said educational programs at said branches, approximately seventy-five (75%) per cent. to eighty (80%) per cent. of the student bodies at each of said branches receiving the benefits thereof as herein alleged.

(j) That the said funds are administered by the faculties of the said branches and are used to cover equipment in the physical educational program, salaries of professors and instructors, laundry, light, heat, water, rifle team supplies, telephone and telegraph, maintenance of athletic fields (labor and material), maintenance of stadium, tennis courts, gymnasiums, polo fields, construction of new athletic fields, upkeep of swimming pool, including heat, water, chlorination and disinfectant, medical supplies, doctors' and hos-

pital bills for students, doctors' and medical supplies, travelling expenses of athletic teams, and in addition thereto at various times the funds have been used for such purposes as paying salaries of professors in other departments, purchasing additional land for complainant, paying school physicians and other general uses incident and essential in the program of education at said branches.

33.

That at one time in the past not involved in this suit, complainant thru one of its branches, the School of Technology, made a return of admissions collected, and paid an amount as a tax to the Collector of Internal Revenue for the said district and then filed a claim for refund which was denied by the Commissioner of Internal Revenue on the ground among others that the complainant's said branch was not the taxpayer on whom the tax was imposed by law.

34.

That the University of Georgia which is coeducational offers thirty (30) courses in physical education for women and there were during 1933-1934 approximately three hundred (300) women per day engaged in the physical education program and of the thirty (30) courses offered, all except two are electives for all degrees offered to women.

35.

Amending paragraph 13 of the original bill of complaint, complainant alleges that said warrants for distraint cover either: (1) alleged taxes allegedly due from various individuals who paid admissions to said ath-

letic contests, which taxes, however, said defendant is seeking to collect from complainant, or (2) that said warrants for distraint cover in fact penalties under Section 1114 of the Revenue Act of 1926, said penalties being criminal and punitive in nature.

WHEREFORE, complainant prays that this amendment be allowed and ordered filed.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
By Marion Smith,
Chairman of the Board of Regents,
COMPLAINANT.

M. J. YEOMANS,
Attorney General, State of Ga.

HAROLD HIRSCH & MARION SMITH
M. E. KILPATRICK,
Solicitors and Counsel for Complainant.

GEORGIA:
FULTON COUNTY:

BEFORE ME, the undersigned attesting officer, personally appeared MARION SMITH, who, being duly sworn, deposes and says that he is Chairman of the Board of Regents of the University System of Georgia; that he is informed as to the contents of the within and foregoing amendment and that based

upon such information he believes the allegations therein to be true.

MARION SMITH

Sworn to and subscribed before me,
this 10 day of January, 1935.

M. E. GRACE,
Notary Public, Fulton County, Ga.

ORDER ALLOWING AMENDMENT.

It appearing to the court that a copy of the above and foregoing amendment has been served on the solicitor for the defendant, it is ordered that said amendment be allowed and ordered filed, subject to objection.

This 11th day of January, 1935.

E. MARVIN UNDERWOOD,
UNITED STATES JUDGE.

Service acknowledged, copy received this 11th day of January, 1935.

LAWRENCE S. CAMP,
U. S. Attorney.
By I. K. HAY, *Asst. U. S. Atty.*

Filed Jan. 11, 1935.

EXHIBIT "F"

BULLETIN OF THE UNIVERSITY OF GEORGIA

Volume XXXIII August, 1933 No. 11e–Serial No. 546

Entered at the Post Office at Athens, Ga., as Second Class Matter, August 31, 1905, under Act of Congress of July 16, 1904.

Issued Monthly by the University

DEPARTMENTS OF PHYSICAL EDUCATION
1933 - 1934

THE UNIVERSITY OF GEORGIA
DEPARTMENTS OF PHYSICAL EDUCATION

Steadman Vincent Sanford, A.B., Litt.D., LLD.
President of The University of Georgia

Herman Jerome Stegeman, Ph.B., M.A.
Associate Professor of Physical Education for Men

Mrs. Mary Ella Lunday Soule, A.B., M.A.
Professor of Physical Education for Women

ANNUAL SESSION

The 133rd annual session of the University of Georgia opens Wednesday, September 27, 1933. Registration of freshmen occurs on September 22 and 23, and of upperclassmen on September 25 and 26.

ENTRANCE REQUIREMENTS

The requirements for entrance are the same as for the other colleges and schools of the University.

Applicants must be of good character, must be graduates of four-year high schools and present 15 units acceptable in this or other states, and must also present a recommendation from the principal of the school. The required entrance units are English (3), History (2), Mathematics (2.5), Foreign Language (2). The remaining units may be chosen from the list of elective subjects.

FEES

The tuition fee is $122.50, payable as follows: Fall quarter $42.50, Winter quarter $40.00, and Spring quarter $40.00. Laboratory fees vary from $2.50 to $7.50 for each quarter. Fees for students not residents of Georgia are $33.33 additional for each quarter. Those who register for the basic courses in Military Science are required to make a deposit of $10.00 for the year. This fee is later returned less deduction for lost equipment and maintenance.

All students in the Coordinate College residents of Georgia, pay, each quarter in advance, a fee of $85.00, which includes room, board, and fees; students not residents of Georgia pay, each quarter in advance, a fee of $118.33.

2.

DEPARTMENT OF PHYSICAL EDUCATION FOR MEN

The addition of a Department of Physical Education for Men to the cirriculum of the College of Education of the University of Georgia fills a long

felt need and offers additional advantages to students of the University.

The physical equipment of the Athletic Association is adequate for the needs of a well-rounded plant. It comprises a stadium, seating 33,000, a baseball diamond with provision for 4,000 spectators; a freshman field, a track, two playgrounds and six tennis courts; also one large gymnasium with a swimming pool, locker rooms and showers, and a large gymnasium floor devoted entirely to physical education and minor indoor sports; in addition, Woodruff Basketball Auditorium, the largest basketball court in the South, with three standard basketball courts.

The Athletic Association sponsors competitive intercollegiate teams in football, basketball, baseball, track, cross country, boxing, swimming, lacrosse, polo, tennis, rifle, and golf, with freshman teams in all of these sports except polo. This should give all Physical Education students ample opportunity for the practice and observation in any intercollegiate sport recognized in the South.

The program of intramural sports will consist of meets and tournaments in such sports as baseball, playground ball, basketball, volley ball, tennis, golf, swimming, and track and in such other sports as become popular from time to time.

The Athens Country Club has one of the most beautiful golf courses in the state, and this available

to University students at a very nominal daily greens fee, or at reduced fees by the month or season.

The Department of Physical Education for Men offers a well selected series of 16 courses, all conducted by men who are experts in their respective fields. A four-year course leads to the degree of Bachelor of Science in Physical Education. These courses comprise not only the history, theory, and principles of the various fields of Physical Education, but include practical courses in the conduct, management, and instruction of all branches of physical education. A major in physical education should be the best possible preparation for any young man planning to enter into teaching and coaching upon graduation. A combination of courses with courses in Education is offered which meets all of the State requirements for a teaching certificate. Practice Teaching and Practice Coaching classes at the University Practice School and in the University, are available to all Senior College students.

The aim of the Department of Physical Education for Men is to equip graduates who are planning to

teach and coach with a thorough theoretical and practical knowledge of all phases of physical education and athletics. The University in past years has been unable to supply the demand in the State for high school coaches. A major in physical education combined with a teaching major in any subject

should assure any graduate of immediate employment on graduation.

The following courses are offered for the year 1933-1934:

JUNIOR DIVISION COURSES

Physical Education 40. Elementary Physical Education for all freshmen not registered for Military Science. *Jones*

Physical Education 41. Elementary Physical Education for all sophomores not registered for Military Science. *Jones*

Physical Education 42. (Zoology 9) Human Physiology.

Physical Education 43, Individual Hygiene—personal hygiene, habits, posture, mental hygiene, diet. *Jones*

Physical Education 44. Introduction to Physical Education—study of the scope of physical education, study of the aims and theories. *Frost*

Physical Education 45. Methods of Teaching Physical Education—records, statistics—comparative study of best methods of teaching physical education. *Frost*

SENIOR DIVISION COURSES

Physical Education 380. Theory and practice—

Football—offense, defense, training, individual skills, coaching methods, positional instruction. *Mehre*

Physical Education 381. Theory and Practice—Basketball—offense, defense, training, individual skills, tournament playing, coaching methods. *Enright*

Physical Education 382. Theory and Practice—Track and Field—training schedules, individual schedules, photographic explanation of all events—officiating—conduct of meets. *Baskin*

Physical Education 383. Advanced Hygiene and Sanitation—school and community hygiene and sanitation—study of epidemics—recognition of treatment of athletic injuries. *Jones*

Physical Education 384. Playground Management and Community Recreation—study of methods and equipment—study of supervision—location—personnel. *Frost*

Physical Education 385. Safety and Health Methods—Red Cross certification—rescue and resuscitation—safety methods in school and industry. *Jones*

Physical Education 386. History and Theory of Physical Education—study of development of physical education and athletics—explanation of advanced theories. *Stegeman*

4

Physical Education 387. Organization and Administration—selection of personnel—development of staff—organization of leagues—intramural organization—competitive theories and practices. *Frost*

Physical Education 388. Advanced Education Methods—study of most advanced methods in operation today—application of these methods to high school and community. *Frost*

Physical Education 389. Theory and Teaching of Corrective Gymnastics—study of corrective methods—time schedules—energy curves—drills in teaching posture and carriage to classes—health drills—study of causes. *Frost*

COURSES IN EDUCATION WITH CREDIT IN PHYSICAL EDUCATION

Education 55. Psychology of Adolescence.

Education 67. History of Education.

Education 81. Methods of Teaching in High School.

Education 111. Extracurricular Activities.

PHYSICAL EDUCATION FOR MEN

This is a four-year course leading to the degree of Bachelor of Science in Education for the purpose of training men as coaches or athletic directors, who will have sufficient Education to satisfy the requirements of the State Department of Education and

will be qualified to give high school instruction in two academic subjects.

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN PHYSICAL EDUCATION

—MEN

FRESHMAN

English 1-2	2
Science	2
Zoology 21-22; Chemistry 21-22, or Physics 21-22.	
Mathematics	1
History 1	1
Physical Education 42	1
Physical Education 40, or Military Science	1
Electives	2
Total	10

SOPHOMORE

	Courses
English 3	1
Psychology 1	1
Education 4	1
Social Sciences	1
Physical Education 43	1
Physical Education 44	1
Physical Education 45	1
Physical Education 41, or Military Service	1

Electives	2
Total	10

5

JUNIOR

	Courses
Physical Education 50	1
Physical Education 51	1
Physical Education 52	1
Physical Education 53	1
Physical Education 54	1
Education 55	1
Education 67	1
Social Sciences	1
Elective	1
Total	9

SENIOR

	Courses
Education 81	1
Education 111	1
Physical Education 56	1
Physical Education 57	1
Physical Education 58	1
Physical Education 59	1
Education	2
Elective	1
Total	9

DEPARTMENT OF PHYSICAL EDUCATION FOR WOMEN

The Department of Physical Education for Women offers a varied program of activities for students throughout their four years at The University of Georgia. The Physical Education building, with its large gymnasium, stage and dance studio, auxiliary gymnasium, heated swimming pool, airy dressing rooms, adequate showers, physical examination rooms, rifle range, class rooms, games room, Women's Athletic Association club room, and offices, provides ideal facilities for the carrying out of the program. The women's athletic fields include hockey and soccer fields, tennis courts, baseball diamonds, archery range, space for volley ball and badminton courts and a sawdust riding ring. A natural amphitheater affords an ideal place for outdoor performances.

The Women's Athletic Association sponsors the intramural tournaments in the various sports offered for women including hockey, soccer, basketball, volley ball, swimming, baseball, track, riflery, archery, tennis, and horseback riding. Telegraphic meets with other colleges and universities are held in riflery, swimming, and archery. Membership in the Women's Athletic Association may be won by any young woman in the University by active participation in sports. Within the W. A. A. are the Dolphin Club and Dance Club. All girls holding the Senior Red Cross Life Saving badge are eligible for membership in the Dolphin Club, while the Dance Club is an honorary club in the Senior College. The Dance Club sponsors the annual Dance Recital in which

all girls registered for courses in the dance may take part.

6

A four-year major course leads to the degree of Bachelor of Science in Physical Education. The program besides providing broad professional training includes courses in the liberal arts, fundamental sciences, and general education, psychology, and methods. The courses in the professional training include: (1) History, theory and principles of various phases of the field, (2) methods of presenting these various activities to attain progressive worthwhile ends, (3) development of skills in the various activities including games and sports, field hockey, basketball, baseball, volley ball, tennis, horseback riding, and riflery, (4) gymnastics—natural, fundamental, and therapeutic, (5) the dance—creative, folk, tap and clog.

The Courses offered include lectures, laboratory periods and the study of special problems in the theory and principles of health and physical education. Every major student must complete a required number of hours of practice teaching in the University practice school and in the University classes under supervision.

The aim of the course is to provide an opportunity for young women interested in Physical Education to secure a liberal education, a basic knowledge of the fundamental sciences and a professional training in physical education. This fits them for more com-

plete living, as well as equipping them for a profession which brings them satisfaction, and in which they may feel that they are doing worthwhile work. Young women may also minor in Physical Education as certain Physical Education courses may be applied toward the requirement of any degree in the University.

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN PHYSICAL EDUCATION—WOMEN

FRESHMAN	Courses
English 1-2	2
Zoology 21-22	2
Psychology 1	1
History	2
Elective	1
Physical Education 5	1
Physical Education 1	1
Total	10

SOPHOMORE	Courses
English 3	1
Educational Psychology 4	1
Foreign Language or elective	2
Chemistry 21-22	2
Elective	1
Physical Education 7, 8	2
Physical Education 2	1
Total	10

JUNIOR

	Courses
Zoology 109	1
Zoology 67	1
Education 55	1
Electives	2
Physical Education 50	1
Physical Education 65	1
Physical Education 69	1
Physical Education 75	1
Total	9

SENIOR

	Courses
Education 80	1
Education 67	1
Electives	2
Physical Education 56	1
Physical Education 71	1
Physical Education 60	1
Physical Education 61	1
Physical Education 76	1
Total	9

Women students specializing in Physical Education will be required to take practice courses in swimming, dancing, gymnastics, sports, or horseback riding each quarter until they pass various achievement tests set up by the Physical Education staff. The credit for this is not to exceed two courses toward the degree. Thirty-eight courses are required for graduation.

All women students majoring in Physical Education are on probation for their first year.

If you wish any additional information or any other bulletin of the University, write the Registrar, The University of Georgia, Athens, Ga.

8

EXHIBIT "G"

BULLETIN OF THE UNIVERSITY OF GEORGIA
Volume XXXIII August, 1933 No. 11b–Serial No. 543

Entered at the Post Office at Athens, Ga., as Second Class Matter, August 31, 1905, under the Act of Congress of July 16, 1904

Issued Monthly by the University
PEABODY COLLEGE OF EDUCATION

ANNOUNCEMENT
1933 - 1934

THE UNIVERSITY OF GEORGIA
PEABODY COLLEGE OF EDUCATION

Steadman Vincent Sanford, A.B., Litt.D., LL.D.
President of the University of Georgia

John Cassius Meadows, A.B., A.M., Ph.D.
Dean of the Peabody College of Education

38

GENERAL INFORMATION

The Peabody College of Education represents the integration of the Peabody School of Education of the University, the Georgia State Teachers College, and the Department of Rural and Vocational Education of the College of Agriculture. The College of Education is an integral part of the University of Georgia for the professional training of teachers. By action of the Board of Regents the College of Education will hereafter provide and administer all professional courses designed for the preparation of teachers and all other educational workers. Its purpose is to assist the student in the acquirement of the knowledge of the subjects which he wishes to teach, to develop a professional attitude toward education, and to develop skill in the use of special methods in teaching and supervision.

The effort of the College is to bring into proper adjustment within the limits of the four-year courses the academic training, the theoretical professional training, and the practical professional training necessary for effective teaching.

The school is a professional school and ranks as such with the other professional schools of the University.

The organization of the College of Education comprises the following divisions: Undergraduate, Graduate, Research, the Laboratory schools, and Recommendations.

DEPARTMENTS OF INSTRUCTION

The College of Education consists of the following departments:

(1) Education: Administration and Supervision, Educational Psychology, Elementary Education, History and Philosophy of Education, Rural and Vocational Education, Secondary Education, Adult Education.

(2) Physical Education.

DEGREES

The College of Education offers the following degrees:

A. Undergraduate degrees: Bachelor of Arts in Education, Bachelor of Science in Education, and Bachelor of Science in Physical Education.

2

B. Graduate degrees: Master of Arts, Master of Science, and Master of Education.

CURRICULA

In providing facilities for the preparation of teachers and other educational workers the needs of the following types of workers are recognized and provided for. Each curriculum is sufficiently flexible to meet the special needs of individual students.

UNDERGRADUATE DIVISION

The undergraduate division provides for the following types of teachers: (1) of Agriculture, (2) of Art, (3) of Elementary School Subjects, (4) of Junior High School Subjects, (5) of High School Subjucts, (6) of Home Economics, (7) of Public School Music, and (8) of Physical Education.

GRADUATE DIVISION

The graduate division provides for the following: (1) Deans of Students and Counselors, (2) Directors of Research, (3) Elementary School Principals, (4) General Supervisors, (5) High School Principals, (6) High School Subject Teachers, (7) Junior High School Principals, (8) School psychologists, (9) School Superintendents, (10) Special Subject Teachers, and (11) Supervisors of Special Subjects.

ADMISSION REQUIREMENTS

Fifteen units, distributed as follows, are the fundamental requirements for regular admission to any college or course in the University, excepting in the College of Agriculture: (1) three units in English, (2) two and one-half in mathematics—one and one-half in algebra, and one in geometry, (3) two in history, and (4) additional units necessary to bring the total to 15 units, with a maximum of four units from Group VI.

THE GRADUATE DIVISION

Graduate work in Education is distinctly professional in character. The purpose of the Division is to secure differentiation from the undergraduate work and to provide the proper stimulus and guidance to graduate students. Graduate work in Education is under the administration and supervision of the University. In addition to this general supervision special direction in the graduate field of Education is rendered by the College of Education. A wide range of graduate courses especially designed for those specializing in the higher levels of Education is offered.

ADVANCED DEGREES

Graduate students in Education may qualify for the degree of Master of Arts, Master of Science, or Master of Education. The minimum residence requirement for the Master of Arts or Master of Science degree is a major of four courses and two

minors of two courses each, of approved graduate credit. The minimum requirement for the Master of Education is a major of eight courses and two minors of four courses each. While residence for a specified time is in no case regarded as sufficient grounds for conferring an advanced degree the Master of Arts and Master of Science degrees contemplate a residence of at least one academic year and the

Master of Education degree contemplates a residence of two academic years. A thesis revealing ability to carry on research projects in the interest of greater school efficiency is required of all graduate students in candidacy for advanced degrees with a major in Education.

BUREAU OF RECOMMENDATIONS

The University of Georgia maintains a Bureau of Recommendations and Appointments in the Division of Publications and Placement for the placement of graduates of the various Colleges of the University. The College of Education cooperates with this Bureau in the placement of teachers. Through this Bureau the College of Education seeks to give all possible assistance to its students and graduates in obtaining positions which they are qualified to fill and to school authorities in securing competent teachers and other educational workers. In order to make this service mutually helpful, information is collected and kept on file concerning both the needs of the school and the qualifications of those available for the positions open. Former students interested in educational work are urged to keep in yearly touch with this Bureau. Students and graduates who desire to avail themselves of this service provided by the University are invited to register. This is accomplished by filling out the required blanks and by the payment of a nominal fee of $1.00.

Correspondence should be addressed to the Director of Publications and Placement, or to the Dean of the College of Education.

43

BUREAU OF EDUCATIONAL RESEARCH

This has for its purpose the encouragement and promotion of scientific research in the work of the public schools of Georgia and of the students and faculty of the College of Education. Scientific measurements of the results of education and of individual differences among pupils are encouraged for all schools. Standard scales and tests for measuring the work of the schools may be purchased at cost through the Bureau, and the services of the Director and other faculty members may be had as needed to initiate the testing. Surveys may thus be made of any phase of school efficiency. There will be no service charge except for the actual expenses of the Director and staff members if needed in person for the testing or survey.

Correspondence regarding the purchase of proper standard testing material or other service of this bureau should be addressed to Dr. Paul R. Morrow, Director.

4

LABORATORY SCHOOLS

Supervised observation and practice teaching is required of all candidates for a degree in the College of Education. Students preparing to teach in high schools do their practice teaching in one or both teaching fields, (major or minor); students preparing to teach in the elementary schools have

their directed teaching in the particular grades in which they are especially preparing to teach. The practice teaching is articulated with the instruction in general and specific methods to the limit of practical possibility. The observation and practice teaching is under the daily direction of competent experienced teachers.

The College of Education is fortunate in having a system of training schools. These schools are available as laboratories for observation and experimentation, and provide excellent opportunities for the study of educational problems and practices. The classroom instruction in Education is thus combined with the opportunity to observe and participate in the activities of these schools. The laboratory schools include:

The Muscogee Elementary School—a well organized school of six grades.

The Academy—a five-year high school, the work of which is fully recognized and accredited by the State Accrediting Commission and by the Association of Colleges and Secondary Schools of the Southern States.

These schools together with the Junior Division are also laboratory schools for graduate professional courses. This represents one of the first attempts to provide for those attempting to teach on the college level, opportunities for observation and directed student-teaching comparable with the opportunities now so generally provided in the preparation of elementary and high school teachers.

TEACHING MAJORS AND MINORS

RELATED MAJORS AND MINORS

The related majors and minors and names in the order of frequency of their appearance in typical high school teaching assignments.

English—Public Speaking, History, Social Sciences, Latin, French.

History—Social Sciences, English, Mathematics, Biological Science, Physical Science, Public Speaking.

Social Science—History, English, Mathematics, Biological Science, Physical Science, Public Speaking.

Latin—English, French, History, Mathematics.

French—Latin, English, History, Mathematics.

Mathematics—Physical Science, History, Social Sciences, Biological Science.

Physical Science—Biological Science, Mathematics, Social Sciences, History.

Biological Science—Physical Science, Mathematics, Social Science, History.

Home Economics—Biological Science, Physical Science, History.

Physical Education—History, Biological Science, Physical Science, Mathematics.

Only 10 academic majors with their related majors and minors are listed above. Such subjects as

5

German and Spanish are not offered as majors or minors because the Georgia market for beginning

teachers does not justify them. It is conceivable that an experienced teacher might desire to take a bachelor's degree from the College of Education with some other related majors and minors. Related majors or minors not listed above may be offered only on approval of the Dean of the College of Education.

ENGLISH MAJOR

	Courses
English 1-2. English Composition	2
English 3. English Literature	1
English 51. Shakespeare	1
English 53. American Literature	1
English 54. Victorian Age	1
English 69, 70. Contemporary Drama	2
The following courses are recommended:	
Journalism 1	1
Public Speaking 1	1

HISTORY MAJOR

History 1. American Government	1
History 2, 3, 4, 5; or 6, 7	2
Additional courses numbered above 50 from fields of European and American history	4

SOCIAL SERVICE MAJORS

History 1. American Government	1
History 2, 3; or 6, 7	2
Additional courses numbered above 50 from fields of European and American History	2
Economics 55. Principles of Economics	1
Sociology 57. Principles of Sociology	1
Geography 51. Principles of Geography	1

LATIN MAJOR

Latin 3-4. Terence, Livy, Horace	2
Latin 5. Cicero, Essays	1
Latin 55. Horace	1
Latin 56. Silver Latin	1
Latin 57. Plautus	1
Latin Elective	1

FRENCH MAJOR

French 3, 4. French Grammar	2
French 5. Modern French Prose	1
French 56. Composition	1
French 57. Phonetics	1
French 60, 61, 62. Survey of French Literature	2

MATHEMATICS MAJOR

Mathematics 1. Trigonometry	1
Mathematics 2. Analytic Geometry	1
Mathematics 3. Calculus	1
Mathematics 112. College Geometry	1
Mathematics 54. College Algebra	1
Mathematics Elective	2

PHYSICAL SCIENCE MAJOR

Physics 21-22. Elementary Physics	2
Physics. Two Senior Division courses	2
Chemistry 21-22. General Chemistry	2
Chemistry 23. Qualitative Analysis	1
Chemistry. One Senior Division Course	1

BIOLOGICAL SCIENCE MAJOR

Botany 21-22. Elementary Botany	2
Botany 70. Taxonomy of Plants	1
Botany 90. Genetics	1
Zoology 21-22. General Zoology	2
Zoology 23. Vertebrate Zoology	1
Zoology 109. Human physiology	1

6

BACHELOR OF SCIENCE IN EDUCATION DEGREE REQUIREMENTS FOR HIGH SCHOOL TEACHERS

(Mathematics-Science-Social Sciences)

Upon the satisfactory completion of 38 courses, under the restrictions and requirements prescribed below, the student will be recommended for the degree of Bachelor of Science in Education.

SUGGESTED CURRICULUM

	Courses
English 1-2, 3	3
Mathematics	1
Social Sciences	4
From History 1, 2, 3, 4, 5, 6, 7; Economics 5; Geography 1, 2; Philosophy 4; Political Science 1; Sociology 6, 7. Two courses must be from History.	
Science	3
From Biology, Botany, Chemistry, Physics, or Zoology.	

Psychology 1 1

Physical Education 1-2; or Military Science 1-2 2

Under certain circumstances a student excused by the University Physician may substitute two other courses for this requirement.

Education 7

The following are required:

Education 1. Introduction to Education or Education 7 (67). History of Education.

Education 4. Educational psychology.

Education 80. The High School, or Principles of Secondary Education.

Education 81. Methods of Teaching in High Schools.

Special Methods in the Teaching of the major subject.

Education 86. Observation and Practice Teaching. (Not required of teachers with three or more years of experience).

Not more than 12 courses in Education will be credited toward a degree.

Each candidate for the degree is required to complete a teaching major and a teaching minor, but two teaching majors are recommended. The teaching majors must be chosen from the fields of Mathematics, or the Sciences, or the Social Sciences.

If the major is chosen from the fields of Science or of the Social Sciences, a composite major comprising two or more fields may be offered.

BACHELOR OF SCIENCE IN EDUCATION DEGREE REQUIREMENTS FOR ELEMENTARY SCHOOL TEACHERS

	Courses
English 1-2, 3	3
Social Sciences	4
From History 2, 3; 4, 5; 6, 7.	
Economics 5.	
Geography 1, 2.	
Philosophy 4.	
Political Science 1 (History 1).	
Sociology 6, 7.	
Two courses must be from History and one course from Geography.	
Science. Biology 19-20	2
Psychology 1	1
Public School Music 2, 12	2
Public School Art 14, 15	2
Speech 1	1
	7
Physical Education	2
Under certain circumstances a student excused by the University Physician may substitute two other courses for this requirement.	
Education	7
The following courses are required:	
Education 1. Introduction to Education, or Education 7 (67). Histroy of Education.	
Education 4. Educational Psychology.	

Education 70. Methods of Teaching in the Primary Grades, or Education 71. Methods of Teaching in the Elementary Grades.

Education 153. Psychology of the Elementary School Subjects, or Special Methods in Teaching the Elementary School Subjects.

Education 52. Child Psychology, or Education 75. School and Class Management.

Education 76. Observation and Practice Teaching. (Not required of teachers with three or more years of experience).

Not more than 12 courses in Education will be credited toward a degree.

Thirty-eight courses are required for this degree. In addition to the 24 prescribed courses listed above 14 additional elective courses must be chosen.

A student preparing to teach in the elementary school is not required to complete a teaching major or minor but is required to complete a program of academic subjects designed to prepare for some phase of elementary school work.

BACHELOR OF ART IN EDUCATION

The curricula which lead to the degree of Bachelor of Arts in Education are intended for those whose teaching interests are in the fields of Language and Literature. Upon the satisfactory completion of 38 courses, under the restrictions and requirements pre-

scribed below, the student will be recommended for the degree of Bachelor of Arts in Education.

REQUIREMENTS FOR A DEGREE

	Courses
English 1-2, 3	3
Mathematics 1	1
Social Sciences	4
Four courses from History 1; 2, 3; 4, 5; 6, 7; Economics 5; Geography 1, 2; Philosophy 4; Political Science 1; Sociology 5, 7. Two courses must be from History.	
Science	3
From Biology, Botany, Chemistry, Physics, or Zoology.	
Psychology 1	1
Foreign Language	
Four courses in high school and college taken together.	
Physical Education 1-2, or Military Science 1-2	2
Under certain circumstances a student excused by the University Physician may substitute two other courses for this requirement.	
Education	7
The following courses are required:	
Education 1. Introduction to Education, or Education 7 (67). History of Education:	
Education 4. Educational Psychology.	
Education 80. The High School, or Principles of Secondary Education.	
Education 81. Methods of Teaching in High School.	

Special Methods in the Teaching of major subjects.

Education 86. Observation and Practice Teaching. (Not required of teachers of three or more years of experience.)

Not more than 12 courses in Education will be credited toward a degree.

8

Each candidate for the degree is required to complete a teaching major and a teaching minor, but two teaching majors are recommended. The teaching majors must be chosen from English, Latin, French, German, and Spanish, or the Social Sciences.

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN AGRICULTURE

FRESHMAN

	Courses
English 1	1
Chemistry 21-22	2
Psychology 1	1
Forestry 2	1
Economics 3	1
Botany	1
History 1 or 4	1
Farm Management 2	1
Military Science 1	1
Total	10

SOPHOMORE

	Courses
English 2	1
Physics 21-22	2
Animal Husbandry 3	1
Soils 10	1
Botany	1
Agricultural Chemistry 1	1
Agricultural Engineering 13	1
Education 29	1
Military Science 2	1
Total	10

JUNIOR

	Courses
Educational Psychology 54	1
Education 91	1
Education 129	1
Farm Management 51	1
Poultry 60	1
Farm Crops 50	1
Horticulture 55. Entomology	1
Horticulture 61	1
Electives	1
Total	9

SENIOR

	Courses
Education 92	1
Education 93	2
Education 192	1
Bacteriology 50	1

Animal Husbandry 73	1
Plant Pathology 55. Genetics	1
Electives	2
Total	9

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN HOME ECONOMICS

FRESHMAN

	Courses
English 2	1
Chemistry 21-22	2
Clothing 20, 21	2
Psychology 4	1
History 1	1
Art 1	1
Psychology 1	1
Physical Education	1
Total	10

9

SOPHOMORE

	Courses
English 3	1
Organic Chemistry	1
Education 4. Educational Psychology	1
Cookery, 5, 6	2
Sociology	1
Economics	1

Physical Education	1
Electives	2
Total	10

JUNIOR

	Courses
Nutrition 52	1
Dietetics 53	1
Psychology of Adolescence 55	1
Education 81. Home Ecomonics Applications	1
Education 84. Special Methods in Home Economics	1
Advanced Foods 50	1
Advanced Clothing 60	1
Textile Economics 61	1
Electives	1
Total	9

SENIOR

	Courses
Education 52. Psychology of Childhood	1
Education 86. Teaching Home Economics	1
Home Management 70	1
Family Relationships 93	1
Home Furnishing	1
Electives	4
Household Mechanics, Sociology, Economics, English, Language, Journalism, Agriculture, Art.	
Total	9

PHYSICAL EDUCATION FOR MEN

This is a four-year course leading to the degree of Bachelor of Science in Education for the purpose of training men as coaches or athletic directors, who will have sufficient Education to satisfy the requirements of the State Department of Education and will be qualified to give high school instruction in two academic subjects.

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN PHYSICAL EDUCATION

—MEN

FRESHMAN

	Courses
English 1, 2	2
Science	2
Zoology 21-22; Chemistry 21-22, or Physics 21-22.	
Mathematics	1
History 1	1
Physical Education 42	1
Physical Education 40, or Military Science	1
Electives	2
Total	10

SOPHOMORE

	Courses
English 3	1
Psychology 1	1

Education 4	1
Social Sciences	1

10

Physical Education 43	1
Physical Education 44	1
Physical Education 45	1
Physical Education 41, or Military Science	1
Electives	2
Total	10

JUNIOR

	Courses
Physical Education 50	1
Physical Education 51	1
Physical Education 52	1
Physical Education 53	1
Physical Education 54	1
Education 55	1
Education 67	1
Social Sciences	1
Elective	1
Total	9

SENIOR

	Courses
Education 81	1
Education 111	1
Physical Education 56	1
Physical Education 57	1

Physical Education 58	1
Physical Education 59	1
Education	2
Elective	1
Total	9

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN PHYSICAL EDUCATION—WOMEN

FRESHMAN

	Courses
English 1-2	2
Zoology 21-22	2
Psychology 1	1
History	2
Elective	1
Physical Education 5	1
Physical Education 1	1
Total	10

SOPHOMORE

	Courses
English 3	1
Educational Psychology 4	1
Foreign Language or elective	2
Chemistry 21-22	2
Elective	1
Physical Education 7, 8	2
Physical Education 2	1
Total	10

JUNIOR

	Courses
Zoology 109	1
Zoology 67	1
Education 55	1
Electives	2
Physical Education 50	1
Physical Education 65	1
Physical Education 69	1
Physical Education 75	1
Total	9

11

SENIOR

	Courses
Education 80	1
Education 67	1
Electives	2
Physical Education 56	1
Physical Education 71	1
Physical Education 60	1
Physical Education 61	1
Physical Education 76	1
Total	9

Women students specializing in Physical Education will be required to take practice courses in swimming, dancing, gymnastics, sports, or horseback riding each quarter until they pass various achievement tests set up by the Physical Education staff.

The credit for this is not to exceed two courses toward the degree. Thirty-eight courses are required for graduation.

All women students majoring in Physical Education are on probation for their first year.

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN PUBLIC SCHOOL MUSIC

FRESHMAN

	Courses
English 1-2 or 3	2
Mathematics 1	1
History 1	1
Physics 21-22	2
Psychology 1	1
Music 2	1
Physical Education	1
Elective	1
Total	10

SOPHOMORE

	Courses
English, Public Speaking	1
History 3	1
Foreign Language	2
Education 1	1
Education 4	1
Music 4	1
Music 12	1
Physical Education	1

Elective	1
Total	10

JUNIOR

	Courses
Art 1	1
Sociology 6	1
Education 52	1
Education 55	1
Education 79	1
Music 63	1
Music 64	½
Electives	2½
Total	9

SENIOR

	Courses
Sociology 57	1
Education 80	1
Education 81	1
Education 76 or 86	1
Music 61	1
Music 52	1
Music 54	1
Electives	2
Total	9

12

CURRICULUM LEADING TO THE DEGREE OF BACHELOR OF SCIENCE IN EDUCATION WITH A MAJOR IN ART

FRESHMAN

	Courses
English 1-2	2
Mathematics 1	1
History 1	1
Physics 21-22	2
Psychology 1	1
Art 1	1
Physical Education	1
Elective	1
Total	10

SOPHOMORE

	Courses
English 3	1
Foreign Language	2
History 3	1
Education 1	1
Education 4	1
Art 14	1
Art 15	1
Physical Education	1
Elective	1
Total	10

JUNIOR

	Courses
Music 52 or 54	1
Sociology 6	1

Education 52	1
Education 55	1
Education 79	1
Art 70	1
Art 81	1
Electives	2
Total	9

SENIOR

	Courses
Education 80	1
Sociology 57	1
Education 81	1
Education 76 or 86	1
Art 90 or 91	1
Art 51	1
Art 67	1
Electives	2
Total	9

13

EDUCATION

A. ADMINISTRATION AND SUPERVISION

90. School Administration ..... Mr. Pusey
104. Educational Administration, State and County [Not offered 1933-34] ..... Mr. Pusey
108. Supervision of Elementary Instruction ..... Mr. Pusey
204. Educational Administration, City ..... Mr. Pusey
205. Public School Business Administration ..... Mr. Pusey

B. EDUCATIONAL PSYCHOLOGY

4. Educational Psychology ..... Mr. Greene and Mr. Mallary
52. Psychology of Childhood ..... Mr. Greene
54. Educational Psychology ..... Mr. Greene
55. Psychology of Adolescence ..... Mr. Morrow
56. Educational Tests and Measurements ..... Mr. Ritchie
102. Advanced Educational Psychology [Not offered 1933-34] ..... Mr. Greene
109. Educational Diagnosis and Treatment of Exceptional Children [Not offered 1933-34] ..... Mr. Greene
110. Principles and Methods of Teaching the Mentally Defective, the Gifted, and Problem Children ..... Mr. Greene
115. Statistical Methods in Education ..... Mr. Morrow
119. Educational Hygiene ..... Mr. Greene
153. The Psychology of Elementary School Subjects ..... Mr. Morrow
158. The Measurement of Intelligence [Not offered 1933-34] ..... Mr. Morrow
211. Problems in Educational Psychology [Not offered 1933-34] ..... Mr. Greene
216. Educational Research [Not offered 1933-34] ..... Mr. Morrow
217. Problems in Educational Statistics [Not offered 1933-34] ..... Mr. Morrow

C. ELEMENTARY EDUCATION

70. Methods of Teaching in the Primary Grades ..... Miss Young
71. Methods of Teaching in the Elementary Grades ..... Mr. Pusey
74-1. Special Methods in Teaching English in the Elementary Grades ..... Miss Young
74-2 Special Methods in Teaching Reading ..... Miss Young
74-3. Special Methods in Teaching Arithmetic in the Elementary Grades ..... Miss Callaway

74-6. Special Methods in Teaching Science in the Elementary Grades.....Mr. Earnest
75. School and Class Management.....Mr. Ritchie
76. Observation and Practice Teaching.....Supervising Teachers
77. Teaching Childrens' Literature.....Miss Vance
78. Visual Aids in Education [Not offered 1933-34].....Mr. Earnest
79. Curriculum Construction in Elementary Grades.....Mr. Pusey

D. HISTORY AND PHILOSOPHY OF EDUCATION

1. Introduction to Education.....Mr. Ritchie
7. History of Education.....Mr. Mallary
62. Character of Education.....Mr. Mallary
67. History of Education.....Mr. Meadows and Mr. Mallary

---

68. History of American Education.....Mr. Mallary
69. Educational Sociology.....Mr. Mallary
100. History of Education [Not offered 1933-34].....Mr. Meadows
103. The Philosophy of Education.....Mr. Meadows

E. RURAL AND VOCATIONAL EDUCATION

29. Introduction to Vocational Education.....Mr. Wheeler
91. Methods of Teaching High School Agriculture.....Mr. Aderhold
92. Adult Education in Vocational Agriculture.....Mr. Aderhold
93. Apprenticeship Teaching Practice.....Mr. Aderhold
94. Rural Education.....Mr. Wheeler
95. Supervised Teaching.....Mr. Aderhold
129. History of Vocational Education.....Mr. Wheeler
191. Special Problems in Teaching Vocational Agriculture.....Mr. Aderhold

192. Projects in Teaching Vocational Agriculture ..... Mr. Aderhold
193. Rural School Administration ..... Mr. Wheeler
194. Rural Secondary School Administration ..... Mr. Wheeler
197. Principles of Rural Education ..... Mr. Aderhold
203. Problems of College Teaching ..... Mr. Wheeler
204. The Supervision of Vocational Education in Agriculture ..... Mr. Wheeler
81-1. Foundation Methods in Home Economics ..... Miss Proctor
84-9. Special Methods in Teaching Home Economics in High School ..... Miss Proctor
86. Observation and Practice Teaching in Home Economics ..... Miss Proctor and Miss Baker
181. Problems in Home Economics Education ..... Miss Proctor
281. Teaching Home Economics in High School ..... Miss Proctor

F. SECONDARY EDUCATION

80. The High School ..... Mr. Meadows
81. Methods of Teaching in High School ..... Mr. Morrow
84-1. Materials and Methods in Teaching English in the High School ..... Mr. Brown
84-2. Materials and Methods in Teaching History in the High School ..... Mr. Payne
84-3. Material and Methods in Teaching Junior and Senior High School Mathematics ..... Miss Callaway
84-5. Special Methods in Teaching Modern Foreign Languages ..... Mr. Chance and Miss Brumby
84-6. Content and Methods in Junior and Senior High School Science ..... Mr. Morrow
84-7. Special Methods in Teaching High School Latin [Not offered 1933-34] ..... Mr. Hooper
86. Observation and Practice Teaching ..... Supervising Teachers

106. The High School Curriculum.....Mr. Morrow
111. Extra-Curricular Activities.....Mr. Mallary
117. Problems in Educational Methods.....Mr. Meadows
120. The High School Principal [Not offered 1933-34].....Mr. Meadows
150. The Junior College [Not offered 1933-34].....Mr. Meadows
182. The Junior High School.....Mr. Morrow
183. Educational and Vocational Guidance ....Mr. Wheeler

15

PHYSICAL EDUCATION—MEN

40. Physical Education.....
41. Physical Education.....
42. Physical Education [Zoology 9, Human Physiology].....Mr. Boyd
43. Individual Hygiene.....Mr. Jones
44. Introduction to Physical Education.....
45. Methods of Teaching Physical Education in High Schools.....
80. Theory and Practice of Physical Education.....Mr. Mehre
81. Theory and Practice of Physical Education.....Mr. Enright
82. Theory and Practice of Physical Education.....Mr. Baskin
83. Advanced Hygiene and Sanitation.....Dr. Reynolds
84. Playground Management and Community Recreation.....
85. Safety and Health Methods.....Mr. Jones
86. History and Theory of Physical Education.....
87. Organization and Administration.....Mr. Stegeman
88. Physical Education Methods.....
89. Theory and Teaching of Corrective Gymnastics.....

PHYSICAL EDUCATION—WOMEN

1.	Physical Education	Staff
2.	Physical Education	Staff
4.	Horsemanship	Capt. Godbold
5.	Introduction to Physical Education	Mrs. Soule
7.	Nature and Function of Play	Miss MacNaught
8.	Leadership	Miss MacNaught
10.	The Dance	Miss Morse
15a.	Swimming [Elementary Swimming]	Miss MacNaught
15b.	Swimming [Advanced Swimming]	Miss MacNaught
50.	Sports	Miss MacNaught
55a.	The Dance	Miss Morse
55b.	The Dance	Miss Morse
56.	Theory of the Dance	Miss Morse
60.	Kinesiology	Miss MacNaught
61.	Theraputic Gymnastics	Miss MacNaught
62.	Advanced Theraputic Gymnastics	Miss MacNaught
65.	Personal and Community Hygiene	Mrs. Soule
69.	Technique of Teaching Physical Education	Miss Morse
70.	Directed Teaching	Mrs. Soule
75.	Principles, Philosophy and History of Physical Education	
76.	Organization and Administration of Health and Physical Educations	Mrs. Soule
200.	Seminar in Physical Education	Mrs. Soule

If you wish any additional information or any other bulletin of the University write the Registrar, The University of Georgia, Athens, Ga.

TITLE OMITTED.

MOTION TO DISMISS

TO THE HONORABLE, THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

Comes now W. E. Page, Collector of Internal Revenue, defendant in the above entitled cause, by Lawrence S. Camp, United States Attorney in and for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his attorneys, and moves the Court to dismiss the Bill of Complaint filed herein, with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment and collection of a Federal tax.

2. The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity.

3. Complainant has a plain, adequate and complete remedy in the ordinary course of law.

4. Complainant is not the real party in interest, in that it affirmatively appears from the Bill of Complaint that the funds in controversy are the amounts collected by Georgia Tech Athletic Association and University of Georgia Athletic Association, respectfully, as and for the tax on admissions to their respective athletic events, and not the property of complainant, and that complainant has no materail interest in the outcome of this suit.

II.

That the United States of America is the real party in interest which may not be sued without its consent.

III.

That there is no actual controversy between complainant and defendant or between any parties over which this Court has jurisdiction within the purview of the Declaratory Judgment Act.

IV.

That the Declaratory Judgment Act was not intended by the Congress to be used for the litigation of questions arising under the Revenue Laws, and particularly was not intended as a means for obtaining injunctive relief. This proceeding is not authorized

by the provisions of said Act and cannot be maintained.

Dated this 15 day of December, 1934.

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

M. H. EUSTACE
Special Assistant to the Attorney General.

Filed December 15, 1934.

TITLE OMITTED.

AMENDMENT TO MOTION TO DISMISS.

Now comes the defendant, subsequent to the filing of the amendment to complainant's petition on January 11, 1935, and being cognizant of the matters and things in said amendment alleged, renews his motion to dismiss, filed in said cause on December 15, 1934, and re-tenders the same to the Court and specifically urges each and every ground in said motion contained, as against the complainant's said amend-

ment, and moves the Court to dismiss the bill of complaint with said amendment as filed herein.

LAWRENCE S. CAMP,

M. NEIL ANDREWS,

ATTORNEYS FOR THE DEFENDANT

ALLOWED, subject to demurrer.

This 24 day of January, 1935.

E. MARVIN UNDERWOOD,
United States Judge.

Filed Jan. 24, 1935.

TITLE OMITTED.

MOTION TO STRIKE AMENDMENT TO BILL.

Now comes the defendant, W. E. Page, Collector of Internal Revenue for the Northern District of Georgia, and moves the Court:

1.

To strike the following paragraphs of plaintiff's amendment to complainant's petition filed on the 11th day of January, 1935, to wit, paragraphs 32, 33, 34 and 35, for the reason that the allegations in

each of said paragraphs are sham, frivolous, irrelevant, immaterial and redundant, constitute conclusions of the pleader, and do not tender an issue.

2.

To strike the allegations, both separately and as a whole, of the entire amendment to complainant's petition filed on said January 11, 1935, for the reason that the matter therein alleged is sham, frivolous, irrelevant, immaterial and redundant, constitute conclusions of the pleader, and do not tender an issue.

LAWRENCE S. CAMP,

M. NEIL ANDREWS,

ATTORNEYS FOR THE DEFENDANT.

Filed Jan. 24, 1935.

TITLE OMITTED.

ANSWER TO BILL OF COMPLAINT AND RETURN TO RULE NISI.

Comes now W. E. Page, Collector of Internal Revenue, defendant in the above entitled cause, by Lawrence S. Camp, United States Attorney in and for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his attorneys, and without waiving any of his rights

and defenses under the motion heretofore filed in his behalf to dismiss the bill of complaint and amendments thereto, but expressly relying upon the same, as if the grounds of said motion were repeated herein, reserving unto himself all manner of exceptions to the errors and insufficiencies of the bill and the amendments thereto filed herein and to the jurisdiction of the Court in the premises, nevertheless, answering so much and such parts of the bill of complaint and the amendments thereto herein as he is advised it is material for him to make answer unto, says:

1.

For answer to the first paragraph of the bill, defendant denies that complainant is a department of the state government of Georgia, but on the contrary, avers that complainant, Regents of the University System of Georgia, is an eleemosynary corporate entity, created, existing and operating under and by virtue of and pursuant to the laws of the State of Georgia, more particularly under Article 6, Title I, Part I of an Act of the General Assembly of Georgia entitled "An Act to simplify the operations of the Executive Branch of the State Government by abolishing certain offices, boards, departments, commissions, and institutions; creating others; redistributing the powers, duties, and functions of said Executive Branch among such offices, boards, commissions, and departments as are herein created or hereby retained; defining such powers, duties, and functions and co-ordinating the same; fixing salaries, terms of office, method of appointment and election, duties and qualifications of the personnel in charge thereof;

repealing all laws and parts of laws in conflict herewith; and for other purposes", approved August 28, 1931 (Georgia Laws 1931, pp. 20-31), and that said complainant, since the date of its creation and organization, has continuously maintained, and now maintains its principal office and place of business at Atlanta, Fulton County, Georgia, and in the Northern District of said State of Georgia.

2.

Defendant admits the averments of the second paragraph of the bill.

3.

Defendant denies that this suit involves a controversy between a department of the State of Georgia, or any branch or subdivision thereof, and/or the Collector of Internal Revenue of the said District of Georgia.

Further answering the third paragraph of the bill, defendant affirmatively avers that this is a suit of a civil nature arising under the Constitution and laws of the United States relating to internal revenue, and that the maintenance of the suit is expressly forbidden by the provisions of Section 3224 of the Revised Statutes, and that the defendant, in doing the acts complained of, was doing so in his official capacity as Collector of Internal Revenue, by direction and authority of the Commissioner of Internal Revenue, pursuant to the internal revenue laws of the United States of America, and all of the acts of defendant

herein, in connection with the matters alleged and charged in the bill, were committed by him under color of his said office.

4.

Defendant admits the averments of the fourth paragraph of the bill.

5.

For answer to the fifth paragraph of the bill, defendant says that he is without knowledge with respect to the averments therein contained.

Further answering the fifth paragraph of the bill, defendant affirmatively avers that under said Act of the General Assembly of Georgia of 1931, it is provided that the University System of Georgia shall consist of the University of Georgia and all its branches, consisting among others of the School of Technology located in Atlanta, Georgia; that during the time mentioned in the bill of complaint, there was maintained at said School of Technology a certain association of students and alumni known and designated as the Georgia Tech Athletic Association, which functioned through a governing board composed of an equal number of faculty members and alumni of said School of Technology; that said Georgia Tech Athletic Association was incorporated under and pursuant to the laws of Georgia on or about March 8, 1934, and ever since said date has been and now is a corporation; that during the months of September and October, 1934, and prior thereto, said Georgia

Tech Athletic Association promoted and had control of the athletic games and events in which teams composed of athletes who were students of said School of Technology competed with teams composed of athletes who were students of other schools or colleges, to which spectators were admitted upon the payment of a certain admission charge of varying amounts.

Further answering the fifth paragraph of the bill, defendant further avers that during the times alleged in the bill, there was maintained at the University of Georgia located at Athens, Georgia, a certain association of students and alumni known and designated as University of Georgia Athletic Association, which, defendant is informed, believes and, therefore, avers, functions through a governing board composed of an equal number of faculty members and alumni of said University of Georgia; that defendant is informed and, therefore, avers that said University of Georgia Athletic Association is a corporation organized and existing under and by virtue of the laws of the State of Georgia; that during the months of September and October, 1934, and prior thereto, said University of Georgia Athletic Association promoted and had control of the athletic games and events in which teams composed of athletes who were students of said University of Georgia competed with teams composed of athletes who were students of other schools or colleges, to which spectators were admitted upon the payment of a certain admission charge of varying amounts.

6.

For answer to the sixth paragraph of the bill, defendant says that he is without knowledge with respect to the averments therein contained.

Further answering the sixth paragraph of the bill, defendant is advised and therefore avers that the athletic games and contests to which admissions were charged, the collection of the tax upon which is sought to be enjoined in this suit, are not and were not an integral or any part of the educational activities of either the University of Georgia or of the School of Technology, but that the conducting of such athletic games was and is primarily for revenue purposes.

7.

For answer to the seventh paragraph of the bill, defendant says that he is without knowledge with respect to the averments therein contained.

Further answering the seventh paragraph of the bill, defendant is advised and therefore avers that neither the physical training nor education incident to the athletic contests for which admissions are charged are a part of the curricula activities of either the University of Georgia or of the School of Technology, and that participation by students in attendance at such institutions in such athletic events to which admissions are charged is not a requirement for any degree conferred by either of said institutions.

Defendant denies the averments of the eighth paragraph of the bill and the whole thereof.

Further answering the eighth paragraph of the bill, defendant affirmatively avers that during the time alleged in the bill of complaint, athletic games and contests were held or played in and upon an athletic stadium situated upon the grounds or campus of said School of Technology to which the general public was admitted as spectators upon payment of admission charges usually evidenced by tickets, which admission charges were collected and sold by said Georgia Tech Athletic Association, acting through one Dr. A. H. Armstrong; that during the months of September and October, 1934, such games or contests were held in said stadium, and the funds derived from the collection of admissions or from the sale of tickets to such games and athletic events were collected and held by said Georgia Tech Athletic Association; that tickets sold by said Georgia Tech Athletic Association to spectators and used by them in gaining admission to said stadium to witness said games or contests had printed on the front or face thereof the words "Admission Price....." (with the amount stated in accordance with the location of the seat to be occupied by the spectator), "Government Tax....." (with the percentage of the admission price due as tax stated), and "Total....." (being the total of Admission and Tax); that printed or stamped on the reverse side of each of such tickets, there appeared the following statement:

Georgia School of Technology, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount collected as a tax as shown on the opposite side of this ticket will therefore be retained by Georgia School of Technology as a part of the admission unless it is finally decided that it is liable for the tax:

that neither the complainant, the Georgia School of Technology, nor said Georgia Tech Athletic Association nor any other person made any returns of taxes so collected, and required by law to be so collected, to the defendant as Collector of Internal Revenue under Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, but, as defendant is informed, believes and, therefore, avers, the Said Georgia Tech Athletic Association kept the amounts so collected as tax separate and apart from all other funds of said Association and deposited the same to the credit of said Association in the First National Bank of Atlanta, Georgia; that the amount so collected as tax by the said Georgia Tech Athletic Association during the months of September and October, 1934, was $3,914.63, no part of which has been paid.

Further answering the eighth paragraph of the bill, defendant affirmatively avers that upon the failure of said Georgia Tech Athletic Association or the said Dr. A. H. Armstrong to make the returns and pay the tax on said admissions, the defendant as Collector of Internal Revenue made returns for said Georgia Tech Athletic Association of admissions tax due and owing by it for the months of September and October,

1934, showing admissions taxes due and owing thereon amounting to $3,914.63; that defendant demanded of said Georgia Tech Athletic Association and of said Dr. A. H. Armstrong the payment of the tax shown to be due and owing thereon.

Further answering the eighth paragraph of the bill, defendant affirmatively avers that during the time alleged in the bill of complaint, athletic games and contests were held or played in and upon an athletic field or stadium situated upon the grounds or campus of Said University of Georgia, and the general public was admitted as spectators upon payment of admissions charges usually evidenced by tickets, which admissions charges were collected and sold by said University of Georgia Athletic Association acting through one Charles E. Martin; that during the months of September and October, 1934, such games or contests were held in said stadium, and the funds derived from the collection of admissions or from the sale of tickets to such games and athletic events were collected and held by said University of Georgia Athletic Association to spectators and used by them in gaining admission to said stadium to witness said games or contests had printed on the front or face thereof the words "Est'd Price....." (with the amount stated in accordance with the location of the seat to be occupied by the spectator), "Tax....." (with the percentage of the admission price due as tax stated), and "Total....." (being the total of Admission and Tax); that printed or stamped on the front of such tickets, there appeared the following statement:

The University of Ga., being an instrumentality of the government of the State of Ga.,

contends that it is not liable for any admission tax. The amount collected as a tax, as shown on the face of this ticket, will therefore, be retained by the University as part of the admission unless it is finally determined that the University is liable for the tax;

that neither the complainant, the University of Georgia, nor the University of Georgia Athletic Association made any returns of taxes so collected and required by law to be so collected, to the defendant as Collector of Internal Revenue under Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, but, as defendant is informed, believes and, therefore, avers, the said University of Georgia Athletic Association kept the amounts so collected as tax separate and apart from all other funds of said Association and deposited the same to the credit of the Association in the Citizens and Southern National Bank in Athens, Georgia; that the amount so collected as tax by the said University of Georgia Athletic Association during the months of September and October, 1934, was $895.37, no part of which has been paid.

Further answering the eighth paragraph of the bill, defendant affirmatively avers that upon the failure of said University of Georgia Athletic Association or the said Charles E. Martin to make the returns and pay the tax on said admissions, the defendant as Collector of Internal Revenue made returns for said University of Georgia Athletic Association of admissions tax due and owing by it for the months of September and October, 1934, showing admissions taxes due and owing thereon amounting to $895.37; that

defendant demanded of said University of Georgia Athletic Association and of said Charles E. Martin the payment of the tax shown to be due and owing thereon.

Further answering the eighth paragraph of the bill, defendant avers that the complainant herein is not a department of the state government of Georgia, nor are the complainant, the University of Georgia, the University of Georgia Athletic Association, Charles E. Martin, the Georgia School of Technology, the Georgia Tech Athletic Association, nor Dr. A. H. Armstrong, nor either or any of them, in the promoting, sponsoring, and/or holding of intercollegiate athletic contests between teams composed of students of the University of Georgia and/or of the Georgia School of Technology and teams composed of students of other colleges and universities, or between teams composed of their own students, respectively, to which the public is admitted upon the payment of an admission charge and for which an admission charge is made, governmental agencies engaged in carrying out an essential governmental function, and no part of the funds involved in this proceeding is the property of complainant or subject to its use for any purpose whatsoever.

9.

For answer to the ninth paragraph of the bill, defendant admits that on or about the 24th day of October, 1934, defendant through a duly authorized Deputy Collector of Internal Revenue served upon one Charles E. Martin, as an officer of the said University

of Georgia Athletic Association, a warrant for distraint, demanding payment from said University of Georgia Athletic Association in the sum of $895.37, being the amount of said admissions taxes due and owing to the United States for the months of September and October, 1934. Defendant admits that there is attached to the bill of complaint, marked Exhibit "A", a copy of said warrant for distraint. Defendant further admits that on the same date he caused to be served upon the said Charles E. Martin a notice of lien on account of such taxes, and avers that notice of such lien on account of such taxes was duly filed on or about said date in the office of the Clerk of the District Court of the United States for the Northern District of Georgia. Defendant admits that there is attached to the bill of complaint, marked Exhibit "B", a copy of said notice of lien. Defendant further admits that on or about said date, he caused to be served on said Charles E. Martin two notices and demands for tax demanding payment from said Charles E. Martin or from said University of Georgia Athletic Association the sum of $895.37 for admissions taxes due on account of admissions collected by said Association during the months of September and October, 1934. Defendant admits that there is attached to the bill of complaint, marked Exhibit "C" and "D", copies of said two demands. All other averments in said paragraph 9 of the bill not herein specifically admitted or qualified are denied.

Further answering the ninth paragraph of the bill, defendant affirmatively avers that on or about the 24th day of October, 1934, he served upon the said

Charles E. Martin and upon the said University of Georgia Athletic Association a warrant for distraint and levied upon the said sum of money which had theretofore been deposited by the said University of Georgia Athletic Association in the Citizens and Southern National Bank of Athens, Georgia, and demanded the payment and delivery to said defendant as Collector of Internal Revenue the said sum of $895.37 admissions tax, and that said bank failed and refused to deliver said sum or any part thereof to the defendant although said bank admitted that it had on deposit to the credit of "Charles Martin, Trustee" the sum of $1,119.71, which defendant avers upon information and belief, is the account in which was deposited the admissions taxes herein involved collected by said Charles E. Martin or said University of Georgia Athletic Association for the months of September and October, 1934.

10.

For answer to the tenth paragraph of the bill, defendant admits that on or about the 25th day of October, 1934, defendant through a duly authorized Deputy Collector of Internal Revenue served upon the Trust Company of Georgia in Atlanta, Georgia, and the Citizens and Southern National Bank in Athens, Georgia, a warrant for distraint and notice of levy, demanding the payment and delivery to said defendant as Collector of Internal Revenue the sum of $895.37, and levying upon accounts in said banks standing in the names of "University of Georgia, Department of Athletics" and "Charles Martin, Trustee", respectively, which defendant is informed and

believes and, therefore, avers were the accounts in which were deposited the proceeds of collections made by the said Charles E. Martin or the said University of Georgia Athletic Association of the admissions taxes herein involved. Defendant admits that there is attached to the bill of complaint, marked Exhibit "E", a copy of said notice of levy. Defendant denies all the remaining averments in said paragraph contained.

11.

For answer to the eleventh paragraph of the bill, defendant avers that he is without knowledge as to whether there is "no such entity as University of Georgia, Department of Athletics". Defendant denies that said or any accounts so levied upon, being so styled and/or carried for convenience only, were the sole and/or exclusive or any property of complainant, and on the contrary avers that no part of said accounts so levied upon by defendant was the property of complainant, and that complainant has no right, title or interest therein whatsoever.

12.

For answer to the twelfth paragraph of the bill, defendant admits that on or about the 25th day of October, 1934, defendant through a duly authorized Deputy Collector of Internal Revenue served upon one Dr. A. H. Armstrong, as an officer of the said Georgia Tech Athletic Association, and upon the First National Bank of Atlanta, a warrant for distraint, demanding payment from said Dr. A. H.

mstrong and from said Georgia Tech Athletic sociation of the sum of $3,914.63 admissions taxes, ing the amount of said admissions taxes due and ing to the United States for the months of Sep- nber and October, 1934, and levying upon an ac- unt in said bank standing in the name of said Georgia ch Athletic Association. Defendant denies all the maining allegations in said paragraph contained.

Further answering the twelfth paragraph of the bill, fendant affirmatively avers that on the 25th day October, 1934, he caused to be served on said Dr. H. Armstrong and upon said Georgia Tech Athletic sociation a warrant for distraint and levied upon e said sum of money which had theretofore been posited by the said Georgia Tech Athletic Asso- tion in the First National Bank of Atlanta, Georgia, d demanded payment and delivery to said defendant Collector of Internal Revenue the said sum of ,914.63 admissions tax, and that said bank failed d refused to deliver said sum of $3,914.63 or any rt thereof to the defendant, although said bank mitted that it had on deposit to the credit of said eorgia Tech Athletic Association the sum of $3,- 4.63, which defendant avers upon information and lief is the account in which was deposited the ad- ssions taxes herein involved collected by said Geor- a Tech Athletic Association for the months of Sep- nber and October, 1934.

13.

For answer to the thirteenth paragraph of the bill, fendant admits that the said warrants for distraint

cover admissions tax which defendant is attempting to collect from said University of Georgia Athletic Association and from said Georgia Tech Athletic Association, respectively, on account of the sums paid to them, respectively, as admissions to their said intercollegiate athletic contests. Defendant denies, however, that he is attempting to collect any taxes whatsoever from the State of Georgia or from any branch of the government of said State. Defendant further denies all of the remaining averments in said paragraph contained not herein specifically admitted, explained, or qualified.

Further answering the thirteenth paragraph of the bill, defendant is informed and believes and, therefore, affirmatively avers that only $3,914.63 was collected by said Dr. A. H. Armstrong or the said Georgia Tech Athletic Association as tax from the spectators of athletic games or contests during the said months of September and October, 1934; that no returns of taxes due and payable for said months were voluntarily filed by said Dr. A. H. Armstrong or by said Georgia Tech Athletic Association with the Collector of Internal Revenue; that the amount due and owing and collected by said Association as admissions tax as aforesaid was ascertained by representatives of said defendant upon investigation of the records of said Georgia Tech Athletic Association by and with its consent; that returns covering the period prior to September 1, 1933, were filed voluntarily by said Georgia Tech Athletic Association, and the taxes arising from admissions prior to said date and collected by said Association from its spectators and patrons were voluntarily paid to the Collector of Internal

Revenue, defendant herein; that no returns of taxes due and payable for the months of September, October, November, and December, 1933, and January, 1934, were voluntarily filed by said Georgia Tech Athletic Association with the Collector of Internal Revenue, and that the amounts due and owing and collected by said Georgia Tech Athletic Association for said months are involved in suit pending in the above entitled Court bearing the same title as this proceeding and being Number 754 in Equity.

Further answering the thirteenth paragraph of the bill, defendant is informed and believes and, therefore, affirmatively avers that only $895.37 was collected by said Charles E. Martin or the said University of Georgia Athletic Association as tax from the spectators of athletic games or contests during the said months of September and October, 1934; that no returns of tax due and payable for said months were voluntarily filed by the said Charles E. Martin or the said University of Georgia Athletic Association with the Collector of Internal Revenue; that the amount due and owing and collected by said Association as admissions tax as aforesaid was ascertained by representatives of said defendant upon investigation of the records of said University of Georgia Athletic Association by and with its consent.

14.

Defendant denies the averments contained in the fourteenth paragraph of the bill.

Further answering the fourteenth paragraph of the

bill, defendant is informed and believes and, therefore, affirmatively avers that complainant has no right, title, or interest whatsoever in or to the funds or any part thereof collected by said Dr. A. H. Armstrong or said Georgia Tech Athletic Association and Charles E. Martin or said University of Georgia Athletic Association, respectively, as proceeds of admissions charged to spectators admitted to said athletic games and contests, but that said funds and the whole thereof, except that part thereof collected as admissions tax, belong respectively to said Georgia Tech Athletic Association and University of Georgia Athletic Association and are respectively used by them exclusively, and that part of said funds collected as tax belongs to the United States of America, and is held by the persons receiving payment for such admissions and collecting said tax, as a special fund in trust for the United States.

15.

For answer to the fifteenth paragraph of the bill, defendant denies that said or any warrants for distraint are or were proceeding illegally and/or contrary to law for the reasons averred by complainant in the fifteenth paragraph of the bill or for any reason whatsoever or at all; denies that complainant's said or any branches constitute a department of the government of the State of Georgia; denies that complainant, or any of its branches, in sponsoring, holding, or carrying on athletic events to which admissions are charged is carrying out purely or any governmental function incident to the government of the State of Georgia, or otherwise; denies that as such, or at all, in carrying

out said or any intercollegiate contests for which it, or anyone else, charged and/or collected admissions is engaged in any governmental operation or function whatsoever; denies that admissions to such contests were not subject to taxation under the Revenue Laws of the United States; and denies that such admissions are not subject to any control or interference by the Federal Government or any of its branches, including the Congress and/or the defendant.

Further answering the fifteenth paragraph of the bill, defendant affirmatively avers that if the complainant has any interest in the funds derived from the proceeds of admissions charged from spectotors by said Dr. A. H. Armstrong or said Georgia Tech Athletic Association and Charles E. Martin or said University of Georgia Athletic Association admitted to their respective games and contests, and if complainant is engaged in carrying out said intercollegiate contests through said Charles E. Martin or said University of Georgia Athletic Association and said Dr. A. H. Armstrong or said Georgia Tech Athletic Association, and if it is charging admissions therefor, it is to that extent acting as a private, corporate, legal individual engaged in a commercial enterprise, and to that extent complainant is not a necessary agency for legitimate purposes of state government but is merely the instrument through which entertainment, for which a charge is made, is furnished to the public. Defendant further avers that if and to the extent complainant is engaged in the sale of admissions to athletic events, it stands upon the same footing upon which every other operator of a place of entertainment and amusement stands where admissions are sold by private

individuals and private corporations who add the internal revenue excise to the price of admission and the purchaser pays it.

Defendant further avers that the tax imposed by the revenue laws of the United States and described in the bill is not a direct tax but an excise tax upon a salable article which is paid by the purchaser; said tax is laid upon the sale of the ticket and there is no compulsion upon anyone to purchase.

Defendant further avers that the excise imposed by the revenue laws of the United States, and described in the bill, will not be paid by the taxpayers of Georgia but by purchasers of admissions to athletic games and contests sold to spectators by said Charles E. Martin or said University of Georgia Athletic Association and said Dr. A. H. Armstrong or said Georgia Tech Athletic Association, respectively, and such admissions will not be expended for ordinary governmental purposes but are receipts resulting from carrying on a commercial business.

16.

For answer to the sixteenth paragraph of the bill, defendant admits that in doing the acts complained of in the bill of complaint, he has been proceeding under the provisions of Section 500 (a) (1) and Section 500 (b) of the Revenue Act of 1926 and Section 500 (b) (1) (e) of the Revenue Act of 1926, as amended by Section 711 (c) of the Revenue Act of 1932, and for a true, correct, and complete statement of the pro-

visions of those sections of the statute defendant respectfully refers the Court to said sections.

17.

For answer to the seventeenth paragraph of the bill, defendant denies that a proper, or any, construction, interpretation and/or enforcement of said, or any, Act would exempt from the operation thereof any and/or all branches or departments of the governments of any of the states, including plaintiff, or at all.

Further answering the seventeenth paragraph of the bill, defendant asserts that the averments therein contained constitute conclusions of law.

18.

For answer to the eighteenth paragraph of the bill, the defendant denies that the Commissioner of Internal Revenue has construed said act as being applicable to and/or enforceable against the departments of government of the several or any states, and denies that complainant is a department of government of any state. Defendant admits that the Commissioner of Internal Revenue promulgated "Informal Ruling No. 7" on July 28, 1934, and that the same provides substantially as quoted by complainant in said eighteenth paragraph of the bill.

19.

For answer to the nineteenth paragraph of the bill, defendant admits that he is seeking to collect the tax

described in said bill pursuant to said ruling of the Commissioner of Internal Revenue. The defendant denies all the remainder of the averments of said paragraph.

Further answering the nineteenth paragraph of the bill, defendant affirmatively avers that the said Charles E. Martin or said University of Georgia Athletic Association and said Dr. A. H. Armstrong or said Georgia Tech Athletic Association have collected from purchasers of tickets of admission to their respective athletic events the admissions tax provided by law to be collected thereon and are wrongfully withholding the payment of the same to the defendant. Defendant denies each and every averment in the nineteenth paragraph of the bill not herein specifically admitted, explained, or qualified.

20.

For answer to the twentieth paragraph of the bill, defendant denies that neither the University of Georgia nor the Georgia School of Technology, pursuant to complainant's or any instructions, have placed upon each or any ticket so sold the words quoted in the twentieth paragraph of the bill, but on the contrary avers that both the Georgia Tech Athletic Association and the University of Georgia Athletic Association have each had printed or stamped on tickets sold by them, respectively, the respective statements set forth in paragraph eight thereof.

21.

For answer to the twenty-first paragraph of the bill,

defendant denies that said Act or any part thereof so construed by the Commissioner of Internal Revenue, or otherwise, is unconstitutional, for the reasons set forth in the twenty-first paragraph of the bill, for any other reason, or at all. Further answering the twenty-first paragraph of the bill, defendant denies the materiality, relevency, and/or the accuracy of the arguments, legal conclusions, and averments contained in the twenty-first paragraph of the bill.

Further answering the twenty-first paragraph of the bill, defendant is informed and believes and therefore affirmatively avers that the complainant has no such right, title, or interest in or to the funds involved herein or any part thereof as would permit complainant to challenge in this proceeding either the constitutionality of the taxing statutes or the validity of the assessment or assessments made against the persons receiving payment of the admissions, the collection of the tax upon which is sought to be enjoined herein.

22.

For answer to the twenty-second paragraph of the bill, defendant denies that complainant and/or its said, or any, departments are branches of the State Government of Georgia, and denies that complainant or any of its said branches have been or will be burdened with the duty of collecting taxes for the Federal Government, or for the defendant.

Further answering defendant avers that he is without knowledge with respect to the remaining averments contained in said paragraph.

23.

For answer to the twenty-third paragraph of the bill, defendant denies that complainant has no remedy at law by paying the tax and suing for its recovery, but affirmatively avers that under the applicable administrative provisions of the Internal Revenue laws summary methods have been provided for the assessment and collection of the taxes involved herein and then for the administrative correction, under claim for refund, or any errors, inaccuracies, or injustices in connection with the determination, assessment, and collection of such taxes; avers that such statutes affords persons receiving payment of admissions and collecting and paying over to the United States the amount of the tax adequate opportunity for obtaining a judicial review at law in the premises such is afforded to any taxpayer who has overpaid his taxes; and avers that such law provide a complete system of corrective justice as between the Government of the United States or its representatives and the person or persons receiving payment of admissions and collecting and paying over the amount of the tax as to the matters involved herein, whereby complainant has a plain, adequate and complete remedy at law in the premises. Further answering, defendant denies that the Commissioner has made any interpretation of said Act which would prevent complainant, if it is the person receiving payment for such admissions and collecting said tax, from making payment of the tax, filing claim for refund, and if rejected, of filing suit against the Collector of Internal Revenue for the recovery thereof; denies that if said tax were paid by complainant, it would be irreparably, or otherwise,

damaged; denies that the amount so paid would be irrevocably, or otherwise, lost if it should be determined that such tax had been exacted illegally; denies that neither complainant and/or its said branches are liable for such tax under the law, and/or under the construction placed on said law by the Commissioner of Internal Revenue and/or the defendant, but on the contrary defendant affirmatively asserts all and singular so much and such part of the fourteenth paragraph hereof as demonstrates that if complainant is engaged in carrying out said athletic contests and charging and collecting admissions therefor, complainant is acting as a private, corporate, legal individual, and liable for the collection and payment over to the United States of the tax herein involved. Further answering, defendant denies that such or any procedure would involve a multiplicity of suits with respect to any actions at law for the recovery of the tax involved herein in the event it may or should be determined that such tax has been or would be exacted illegally, but on the contrary defendant avers that Section 3228, 3220 and 3226 of the Revised Statutes, as amended, make adequate provision for presenting claims for refund of taxes alleged to have been exacted illegally, to the Commissioner of Internal Revenue at any time within four years after payment of the disputed exactions, whereby the person receiving payment for such admissions, collecting and paying over said tax might join his or its payments of taxes for many months in one claim for refund and in one suit at law in the event the Commissioner should reject such claim for refund in whole or in part. Further answering, defendant denies each and every averment in said twenty-third para-

graph of the bill not herein specfically admitted, explained or qualified.

Further answering the twenty-third paragraph of the bill, defendant affirmatively avers that if said tax or any part thereof is erroneously collected or is, or should be, held to be illegally exacted, the said Georgia Tech Athletic Association and said University of Georgia Athletic Association, respectively, or any other person receiving payments for such admissions, have an adequate remedy at law in the premises by payment of the tax in question and bringing suit against the collecting officer for its recovery.

24.

For answer to the twenty-fourth paragraph of the bill, defendant denies that he is seeking or has sought to distrain upon any property belonging to complainant; denies that he is seeking or has sought to collect from complainant and/or its branches any admissions taxes whatsoever; and denies that any action taken or sought to be taken by defendant with respect to the taxes herein involved is contrary to law. Further answering, defendant denies each and every averment in said twenty-fourth paragraph of the bill not herein specifically admitted, explained or qualified.

Further answering the twenty-fourth paragraph of the bill, defendant affirmatively avers that the amount of tax and the interest thereon due and owing to the United States from said Georgia Tech Athletic Association and the said University of Georgia Athletic Association, respectively, has been lawfully assessed

and the said Georgia Tech Athletic Association and the said University of Georgia Athletic Association are respectively liable for the tax assessed against them and described in the bill of complaint. Defendant avers that such liability is primary and direct and may be enforced. Defendant further avers that he has a right under the law to collect from said Georgia Tech Athletic Association and from said University of Georgia Athletic Association, respectively, the tax involved in this proceeding. Defendant further avers that neither complainant, the Georgia Tech Athletic Association, the University of Georgia Athletic Association, nor any one on its or their behalf can challenge the validity of such tax until said tax has first been paid.

25.

For answer to the twenty-fifth paragraph of the bill, defendant denies that said, or any, proceedings under said warrants for distraint and/or levies interfere with the proper, or other, operation of the government of the State of Georgia, or at all; denies that the same prevents the use of any funds belonging to complainant; denies that the same should be restrained.

Further answering the twenty-fifth paragraph of the bill defendant affirmatively avers that complainant has no such right, title, or interest in or to the funds involved herein or any part thereof as would permit complainant to challenge in this proceeding either the constitutionality of the tax imposing statute or the validity of the assessment or assessments against the person or persons receiving payment for the ad-

101

missions to the athletic contests hereinbefore described, and the collection of which assessment or assessments are sought to be enjoined herein.

Further answering the twenty-fifth paragraph of the bill defendant affirmatively avers that complainant is not the real party in interest in that no part of the amounts involved is the property of complainant, and complainant has no material interest in the outcome of this suit.

26.

For answer to the twenty-sixth paragraph of the bill, defendant denies that under the, or any, of the circumstances involved, or under any of the circumstances averred in the bill, or at all, the defendant is attempting to collect from complainant taxes due from various individuals; denies that complainant is a department of the government of the State of Georgia; and denies that there are any exceptional and/or extraordinary circumstances involved herein. Further answering, defendant denies that the materiality and accuracy of the arguments, legal conclusions, and averments set forth in said paragraph.

Further answering the twenty-sixth paragraph of the bill, defendant avers that the averments contained therein constitute conclusions of law.

27.

For answer to the twenty-seventh paragraph of the bill, defendant admits that the State of Georgia

is a sovereign state. Defendant denies, however, that either complainant or its branches is sovereign and/or independent in its or their sphere of governmental action and/or operation; denies that complainant and/or its branches are carrying out any governmental functions whatsoever in so far as its activities may relate to the holding of athletic contests or the charging and collecting of admissions thereto; and denies that he is attempting or that he has attempted to interfere or control complainant in any manner whatsoever in the exercise of any functions, governmental or otherwise, which complainant may be entitled to carry on.

28.

For answer to the twenty-eighth paragraph of the bill defendant denies that if an injunction does not issue as prayed for, or otherwise, complainant will suffer irreparable or other injury and/or damage, through the actions of defendant, his agents, deputies, servants, and/or employees, or at all; and denies that complainant has no adequate remedy at law. With respect to the averments contained in the twenty-eighth paragraph of the bill, the defendant affirmatively asserts, all and singular, so much and such parts of the twenty-third paragraph of this answer as demonstrate that the complainant has an adequate remedy at law in the premises.

29.

For answer to the twenty-ninth paragraph of the bill, defendant says that he is without knowledge with respect to the averments therein contained.

With respect to the averments of the twenty-ninth paragraph of the bill, defendant asserts all and singular so much and such part of the eighth paragraph hereof as demonstrates that said Georgia Tech Athletic Association and said University of Georgia Athletic Association each have collected from the purchasers of tickets of admission to their respective athletic events the amounts provided by law to be collected from such purchasers, respectively, as and for the admissions tax thereon imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, whereby no part of said funds is the property of complainant, and complainant has no right or title to the same or any part thereof.

30.

For answer to the thirtieth paragraph of the bill, defendant denies that complainant is a department of the State of Georgia. Further answering defendant says that he is without knowledge with respect to the remaining averments contained in the thirtieth paragraph of the bill.

With respect to the averments of the thirtieth paragraph of the bill, defendant asserts all and singular so much and such part of the affirmative averments herein contained as demonstrates that said complainant is not the real party in interest in this proceeding, whereby there is no actual controversy between complainant and defendant herein, and no such actual controversy is likely to arise hereunder.

Further answering the thirtieth paragraph of the bill, defendant avers that since the filing of the bill

of complaint herein and the amendments thereto the Congress has enacted, and on August 30, 1935, the President approved Public Law No. 407 of the 74th Congress, First Session (H. R. 8974), entitled "An Act to provide Revenue, equalize taxation, and for other purposes", known and cited as the Revenue Act of 1935; and in and by Section 405 of said Act, any power which this Court may have ever had to grant a Declaratory Judgment in this proceeding has been completely removed.

31.

For answer to the thirty-first paragraph of the bill, defendant denies that any of the individuals who paid admissions to athletic contests held at either the University of Georgia or at the School of Technology since June 5, 1932 (the effective date of the Revenue Act of 1932), where the price of admission was in excess of forty-one cents, are or were not liable for the admission tax thereon; denies that the collection of said admissions is one, or any, means by which complainant, through its said branches or otherwise, receives revenue for the purpose of carrying out its said, or any, governmental functions, or at all; denies that any tax imposed upon individuals attending said athletic contests would constitute plain, or any interference with any governmental functions of the State of Georgia; and denies that the same would constitute any burden whatsoever upon any governmental functions of the State of Georgia, or at all. Further answering defendant denies each and every averment in said thirty-first paragraph of the bill not herein specifically admitted, explained or qualified.

32.

For answer to the thirty-second paragraph of the amendments to the bill, defendant says that he is without knowledge with respect to the averments therein contained, or contained in any of the sub-paragraphs thereof. Further answering defendant denies the materiality and accuracy of the arguments, legal conclusions, and averments set forth therein. Defendant avers, however, that participation in inter-collegiate contests to which admissions are charged, by students in attendance at the University of Georgia and/or the School of Technology, is not a requirement for graduation from or for any degree awarded by either of said schools.

33.

For answer to the thirty-third paragraph of the amendments to the bill, defendant denies that at one time in the past, or at any other time, or at all, complainant through the School of Technology, or otherwise, made a return of admissions collected, and/or paid an amount or any amount whatsoever as a tax, or otherwise, or at all, to the Collector of Internal Revenue for said, or any, district; denies that complainant then, or at any time, or at all, filed a claim for refund; denies that the Commissioner of Internal Revenue denied any claim for refund whatsoever filed by complainant, upon the grounds averred in said paragraph or upon any other grounds, or at all.

Further answering the thirty-third paragraph of the amendments to the bill, defendant affirmatively

avers that on or about November 30, 1932, the Georgia Tech Athletic Association filed with the Collector of Internal Revenue for the Collection District of Georgia a return of tax on admissions to athletic events held at the School of Technology during the month of October, 1932, and on or about December 1, 1932, paid said tax to said Collector of Internal Revenue, amounting to $5,111.37. Thereafter, and on or about December 21, 1932, the said Georgia Tech Athletic Association filed with the said Collector of Internal Revenue a return of tax on admissions to athletic events held at said School of Technology during the month of November, 1932, and on or about December 23, 1932, paid said tax to said Collector of Internal Revenue, amounting to $5,848.80. Thereafter, on or about February 14, 1933, and February 28, 1933, respectively, said Georgia Tech Athletic Association paid to said Collector of Internal Revenue $158.33 and $63.12, respectively, for admissions tax to athletic events held at said School of Technology during the months of January and February, 1933, respectively. Thereafter and on or about July 11, 1933, said Georgia Tech Athletic Association filed with the Commissioner of Internal Revenue a claim for refund for $11,181.62, representing admissions taxes paid by it for the months of October and November, 1932, and January and February, 1933. Said claim was refund for rejected by said Commissioner of Internal Revenue in full, upon the grounds that Subdivision (e) of Section 500 of the Revenue Act of 1926, which was added by Section 711 (c) of the Revenue Act of 1932, provides that the exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition, the proceeds of

which inure wholly or partly to the benefit of any college or university (including any academy or the military or naval forces of the United States.) Said Georgia Tech Athletic Association was notified of the rejection of said claim for refund by letter dated October 11, 1933.

Further answering, defendant avers that any action which may have been taken by the Commissioner of Internal Revenue with respect to Federal admissions tax liability for admissions to athletic contests participated in by students in attendance at the School of Technology, during the year 1932, or for any year, neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or upon his behalf.

34.

For answer to the thirty-fourth paragraph of the amendments to the bill, defendant says that he is without knowledge with respect to the averments therein contained. Defendant avers, however, that said averments are irrelevent and immaterial to any issue of law or fact involved in this proceeding.

35.

For answer to the thirty-fifth paragraph of the amendments to the bill, purporting to be an amendment to the thirteenth paragraph of the bill, defendant adopts all and singular his answer to the thirteenth paragraph of the bill to the same effect as if repeated at length herein. Further answering defendant denies

that said or any warrants for distraint cover in fact, or at all, penalties under Section 1114 of the Revenue Act of 1926, or under any other statute, or at all; denies that said, or any, penalties are criminal and/or punitive in nature; and denies that defendant is seeking, or ever has sought to collect any taxes whatsoever from complainant.

Further answering the Bill of Complaint and the amendments thereto filed herein, and by way of affirmative defense thereto, and for further, separate, and complete defense thereto, and further reserving and relying upon the motion to dismiss filed herein, the defendant avers;

1.

Defendant affirmatively asserts all and singular so much and such parts of the affirmative averments set forth in the several preceding paragraphs hereof as demonstrate that Georgia Tech Athletic Association and the University of Georgia Athletic Association through their respective officers, agents, servants and employees, had each collected from purchasers of tickets to their respective intercollegiate athletic events the respective amounts required by law to be collected as admissions tax thereon amounting in all to the respective amounts herein involved; that neither the complainant, the said Georgia Tech Athletic Association, the University of Georgia Athletic Association, nor anyone on its or their behalf have made or filed any returns of admissions taxes so collected and required by law to be so collected by said Georgia Tech Athletic Association, and said University of Georgia Athletic Association, re-

spectively, for the months of September and October, 1934, nor any part thereof; that neither the complainant, the said Georgia Tech Athletic Association, the said University of Georgia Athletic Association, nor anyone on its or their behalf have paid to the defendant or to the United States any taxes whatsoever, which accrued by reason of the sale by said respective athletic associations of tickets of admission to athletic games and contests promoted and/or sponsored and held by said Athletic Associations, respectively, during the months of September and October, 1934; that said Georgia Tech Athletic Association is indebted to the United States of America in the sum of $3,914.63, together with interest thereon as provided by law on account of admissions tax for the months of September and October, 1934, and the said University of Georgia Athletic Association is indebted to the United States of America in the sum of $895.37, together with interest thereon as provided by law on account of admissions tax for the months of September and October, 1934; that the defendant has demanded of each of said associations and their respective officers, agents, servants and employees the amount of admissions tax so due and owing by each of them, respectively, and that the same and the whole thereof remains unpaid; and that the complainant has no right, title or interest to any part of the funds involved in this proceeding; all of which is reasserted and averred to all intents and purposes as if the same were repeated and set forth at length herein.

Defendant further avers that under and pursuant to the provisions of Section 607 of the Revenue Act

of 1934, the amounts of admissions tax so collected by the University of Georgia Athletic Association, or by Charles E. Martin, on admissions to athletic events for the months of September and October, 1934, amounting to $895.37, and the amounts of admissions tax so collected by the Georgia Tech Athletic Association, or by Dr. A. H. Armstrong, on admissions to athletic events for the months of September and October, 1934, amounting to $3,914.63, are special funds held in trust for the United States, and the amounts thereof are and were at all times herein mentioned subject to assessment, collection and payment in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such funds arose.

2.

That this is a suit in equity to enjoin the collection of admissions taxes assessed against the Georgia Tech Athletic Association and the University of Georgia Athletic Association under the provisions of Section 500 (a) (1) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and Section 500 (e) of the Revenue Act of 1926, as added by Section 711 (c) of the Revenue Act of 1932, in the amounts of $3,914.63 and $895.37, respectively, and that the maintenance of this suit is expressly forbidden by the provisions of Section 3224 of the Revised Statutes of the United States.

3.

That in doing the acts complained of in this suit, the defendant was doing so in his official capacity as

Collector of Internal Revenue by direction and Author
ity of the Commissioner of Internal Revenue pursuan
to the internal revenue laws of the United States
and all of the acts of the defendant in connection wit
the matters and things charged in the Bill of Complain
and amendments thereto herein were committed b
him under color of his said office.

4.

That the taxes, collection of which is sought to b
enjoined in this suit, were legally assessed and are law
fully due and owing to the United States of America

5.

That insofar as tax liens are involved the Unite
States of America is the real party in interest whic
has not been sued herein and which may not be sue
without its consent.

6.

That by virtue of the premises and because th
complainant has no right, title or interest in or to an
part of the subject matter of this proceeding, and i
not a real party in interest, and because the Unite
States is the real party in interest in the ownershi
and right to the funds herein involved, there is n
actual controversy between complainant and defen
dant, or between any parties over which this Cour
has jurisdiction, within the purview of the Declara
tory Judgment Act.

7.

That the Declaratory Judgment Act was not intended by the Congress to be used for the litigation of questions arising under the Revenue Laws, and particularly was not intended as a means for obtaining injunctive relief and thereby restraining or interfering with the collection of Federal taxes.

8.

That this proceeding is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Further answering the Bill of Complaint and amendments thereto filed herein, and by way of further affirmative, separate and complete defense thereto, defendant says that this Court is without jurisdiction to enjoin the collection of the taxes herein involved, because:

1.

Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment and collection of a Federal tax.

2.

The Bill of Complaint and the amendments thereto set forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity.

3.

Complainant has a plain, adequate and complete remedy in the ordinary course of law.

4.

Complainant is not the real party in interest, in that it affirmatively appears from the Bill of Complaint and amendments thereto, that the funds in controversy are the amounts collected by Georgia Tech Athletic Association and University of Georgia Athletic Association, respectively, as and for the tax on admissions to their respective athletic events, and not the property of complainant, and that complainant has no material interest in the outcome of this suit.

WHEREFORE, having fully answered the Bill of Complaint and amendments thereto, the defendant prays that the Bill of Complaint and amendments thereto be dismissed and that the temporary restraining order issued herein be discharged with costs.

W. E. PAGE,
Collector of Internal Revenue for the District of Georgia

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

Solicitors for Defendant.

GEORGIA)
) ss:
FULTON COUNTY)

BEFORE ME, the undersigned attesting officer, personally appeared W. E. PAGE, who being duly sworn on oath says that he is Collector of Internal Revenue for the District of Georgia, that deponent has read the within and foregoing answer and that the facts stated are true to the best of deponent's knowledge, information and belief.

W. E. PAGE.

Sworn to and subscribed to before me, this 22nd day of April, 1936.

R. S. MOONEY

(NOTARIAL SEAL)

Due and lawful service of the within and foregoing answer acknowledged. Copy received. This 23rd day of April, 1936.

HAROLD HIRSCH & MARION SMITH,

M. E. KILPATRICK,

Solicitors for Complainant.

Filed April 23, 1936.

TITLE OMITTED.

MOTION TO DISMISS BILL OF COMPLAINT

Come now W. E. Page, Collector of Internal Revenue, defendant in the above entitled cause, by Lawrence S. Camp, United States Attorney in and for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his attorneys, and after the close of all the evidence and before submission of said cause to the Court and prior to the announcement by the Court of its decision and the entry of final decree, and respectfully moves the Court for a dismissal of the bill of complaint and the amendments thereto on file herein, and that defendant have judgment for its costs as provided by law, on the following grounds:

I.

That the equities are with the defendant.

II.

That the plaintiff has failed to sustain the burden of proving a cause for equitable relief in its favor against the defendant.

III.

That the pleadings and the evidence in this case are insufficient in law to sustain a judgment and decree in favor of the plaintiff and against the defendant.

IV.

That under the law and the evidence the University of Georgia Athletic Association, its officers, agents, and employees, and the Georgia Tech Athletic Association, its officers, agents, and employees have collected for the United States of America admission taxes upon athletic games and events held during the months of September and October, 1934, in the respective amounts of $895.37 and $3,914.63, on account of taxes imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, which said respective amounts are special funds in trust for the United States, pursuant to the provisions of Section 607 of the Revenue Act of 1934.

V.

That under the law and the evidence the taxes involved in this proceeding were lawfully assessed by the Commissioner of Internal Revenue against the University of Georgia Athletic Association, Charles E. Martin, Trustee, University of Georgia Department of Athletics, and against Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Dr. D. Kalhurst, and Mr. Glenn (W. H.), respectively, and each of them.

VI.

That under the law and the evidence the admissions to the athletic games or contests held or played at the University of Georgia and of the School of Technology during the months of September and October, 1934, to which the public was admitted upon the payment of an admission charge and participated in by students in attendance at said University and at School of Technology, respectively, were subject to the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932.

VII.

That under the law and the evidence the tax imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, is not a direct tax but is a tax on admissions which is paid by the purchaser.

VIII.

That under the law and the evidence, if the State of Georgia or complainant has any interest in the funds derived from proceeds of admissions charged and collected from spectators admitted to athletic games or contests held or played at the University of Georgia or at the School of Technology and participated in by students in attendance at said University or at said School of Technology in competition with students in attendance at other colleges and universities; and if the State of Georgia or complainant is engaged in

carrying on said intercollegiate contests and charging admissions thereto, it or they to that extent are acting as a private corporate individual engaged in a commercial enterprise.

IX.

That under the law and the evidence neither the State of Georgia, the Regents of the University System of Georgia, the University of Georgia, the University of Georgia Athletic Association, the School of Technology, not the Georgia Tech Athletic Association has any right, title, or interest whatsoever in or to any part of that part of the proceeds of admissions to athletic contests and games, collected during the months of September and October, 1934, from spectators as a Federal tax by the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, upon the admissions to such games held or played at said University or at said School of Technology.

X.

That the complainant is not a department of the State government of Georgia.

XI.

That neither the complainant, the University of Georgia, the University of Georgia Athletic Association, Charles E. Martin, the School of Technology, the Georgia Tech Athletic Association nor Dr. A. H. Armstrong, nor either or any of them, nor any person

or persons acting by, through, or for them, or any of them, in the promoting, sponsoring and/or holding of intercollegiate athletic contests between teams composed of students of the University of Georgia and/or the School of Technology and teams composed of students of other colleges and universities, or between teams composed of their own students, respectively, to which the public is admitted upon the payment of an admission charge and for which an admission charge is made, is a governmental agency engaged in carrying out an essential governmental function, and no part of the funds involved in this proceeding is the property of complainant or subject to its use for any purpose whatsoever.

XII.

That this suit is specifically prohibited by the provisions of Section 3224, Revised Statutes.

XIII.

That complainant has a plain, adequate and complete remedy in the ordinary course at law.

XIV.

That there is no actual controversy between complainant and defendant or between any parties over which this Court has jurisdiction within the purview of the Declaratory Judgement Act.

XV.

That this proceeding is not authorized by the pro-
sions of the Declaratory Judgment Act and cannot
e maintained.

XVI.

That under the law and the evidence the com-
ainant is not entitled to the relief prayed for in a
urt of equity.

XVII.

That under the law and the evidence the record
oes not contain any substantial evidence to sustain
ndings of fact and conclusions of law and decree in
vor of the plaintiff and against the defendant.

XVIII.

That the pleadings and the evidence in this case,
ith every inference that may be drawn from it, are
sufficient in law to sustain a judgment and decree
favor of the plaintiff and against the defendant.

XIX.

That the defendant, on the pleadings and the evi-
ence in this case, is entitled to judgment and decree
its favor against the plaintiff dismissing the bill of
omplaint.

In the event the Court overrules the defendant's
otion to dismiss on any of the specific grounds there-

in set forth, defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts and prays that he be allowed an exception or exceptions to the action and ruling of the Court in making and entering any findings of fact and conclusions of law or either thereof requested by plaintiff.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

M. NEIL ANDREWS,
Assistant United States Attorney.

Filed Sept. 15, 1936.

TITLE OMITTED.

DEFENDANT'S MOTION FOR SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now W. E. Page, Collector of Internal Revenue, defendant in the above entitled cause, by Lawrence S. Camp, United States Attorney in and for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his attorneys, and respectfully moves the Court to make and enter the following specific findings of fact

and to declare and enter the following conclusions of law in said cause, to-wit:

FINDINGS OF FACT

I.

Complainant, Regents of the University System of Georgia, is an eleemosynary corporate entity created, existing, and operating under and by virtue of and pursuant to the laws of the State of Georgia, more particularly under Article 6, Title I, Part I, of an Act of the General Assembly of Georgia entitled "An Act to Simplify the Operations of the Executive Branch of the State Government by Abolishing Certain offices, boards, departments, commissions, and institutions; creating others; redistributing the powers, duties, and functions of said Executive Branch among such offices, boards, commissions, and departments as are herein created or hereby retained; defining such powers, duties, and functions and co-ordinating the same; fixing salaries, terms of office, method of appointment and election, duties and qualifications of the personnel in charge thereof; repealing all laws and parts of laws in conflict herewith; and for other purposes", approved August 28, 1931 (Georgia Laws 1931, pp. 20-31), and that said complainant, since the date of its creation and organization, has continuously maintained, and now maintains its principal office and place of business at Atlanta, Fulton County, Georgia, and in the Northern District of said State of Georgia.

II.

Defendant, W. E. Page, was appointed United States Collector of Internal Revenue for the Collection District of Georgia on June 20, 1933, and ever since that date has been and now is the duly appointed, qualified, and acting Collector of Internal Revenue for the Collection District of Georgia, and during all of said time was and now is a citizen and resident of Atlanta, Fulton County, Georgia, and in the Northern District of said State.

III.

Pursuant to said Act of the General Assembly of the State of Georgia, there was created the University System of Georgia which includes the University of Georgia located at Athens, Georgia, and the School of Technology located at Atlanta, Georgia, each of which is and at all times herein mentioned has been operated under the supervision and control of the said complainant, Regents of the University System of Georgia.

IV.

This is a suit of civil nature arising under the Constitution and Laws of the United States relating to internal revenue, and the defendant in doing the acts complained of was doing so in his official capacity as Collector of Internal Revenue by direction and authority of the Commissioner of Internal Revenue pursuant to the Internal Revenue Laws of the United States, and all of the acts of the defendant herein in connection

with the matters alleged and charged in the bill of complaint were committed by him under color of his said office.

V.

During the times alleged in the bill of complaint, there was maintained at the University of Georgia located at Athens, Georgia, a certain association of students and alumni known and designated as University of Georgia Athletic Association, which functions through a governing board composed of an equal number of faculty members and alumni of said University of Georgia. During the times mentioned in the bill of complaint, said University of Georgia Athletic Association was and is a corporation organized and existing under and by virtue of the laws of the State of Georgia. During the months of September and October, 1934, and prior thereto, said University of Georgia Athletic Association promoted and had control of the athletic games and events, in which teams composed of athletes who were students of said University of Georgia competed with teams composed of athletes who were students at other schools or colleges, to which spectators were admitted upon payment of a certain admission charge of varying amounts.

VI.

During the times mentioned in the bill of complaint, there was maintained at the School of Technology, located at Atlanta, Georgia, a certain association of students and alumni known and designated as the Georgia Tech Athletic Association which functioned

through a governing board composed of an equal number of faculty members and alumni of said School of Technology. Said Georgia Tech Athletic Association was incorporated under and pursuant to the laws of Georgia on or about March 8, 1934, and ever since that date has been and now is a corporation. Prior to the date of said incorporation, said Georgia Tech Athletic Association operated and functioned as an unincorporated association. During the months of September and October, 1934, and prior thereto, said Georgia Tech Athletic Association, either as an unincorporated association or as a corporation, promoted and had control of the athletic games and events, in which teams composed of athletes who were students of said School of Technology competed with teams composed of athletes who were students of other schools or colleges, to which spectators were admitted upon payment of a certain admission charge of varying amounts.

VII.

During the months of September and October, 1934, athletic games and contests were held or played in and upon an athletic field or stadium situated upon the grounds or campus of said University of Georgia, and the general public was admitted as spectators upon the payment of admission charges usually evidenced by tickets, which admission charges were collected and said tickets were sold by said University of Georgia Athletic Association, acting through one Charles E. Martin. During said months of September and October, 1934, such games or contests were held in said stadium, and the funds derived from the col-

ection of admissions or from the sale of tickets to such games and athletic events were collected and held by said University of Georgia Athletic Association. Tickets sold by the University of Georgia Athletic Association to spectators and used by them in gaining admission to said stadium to witness said games or contests had printed on the front or face thereof the words "Est'd Price....." (with the amount stated in accordance with the location of the seat to be occupied by the spectator), "Tax....." (with the percentage of the admission price due as tax stated), and "Total....." (being the total of Admission and Tax). Printed or stamped on the front of such tickets, there appeared the following statement:

> The University of Ga., being an instrumentality of the government of the State of Ga., contends that it is not liable for any admission tax. The amount collected as a tax, as shown on the face of this ticket, will therefore, be retained by the University as part of the admission unless it is finally determined that the University is liable for the tax.

Upon each of said tickets so sold and for each admission so sold said University of Georgia Athletic Association collected from the purchasers of such tickets or admissions, in addition to the admission price, an amount equal to ten per cent of said admission price as and for the admission tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, being the amount designated on said tickets as "Government Tax."

VIII.

Neither the complainant, the University of Georgia, nor the University of Georgia Athletic Association made any returns of taxes so collected to the defendant as Collector of Internal Revenue under Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, but said University of Georgia Athletic Association kept the amount so collected as a tax separate and apart from all other funds of said Association and deposited the same to the credit of said Association in the Citizens and Southern National Bank of Athens, Georgia. The amount so collected as tax by the said University of Georgia Athletic Association during said months of September and October, 1934, was $895.37, no part of which was been paid to the defendant or to the United States.

IX.

Upon the failure of the said University of Georgia Athletic Association or the said Charles E. Martin to make returns and pay the tax on said admissions, the defendant as Collector of Internal Revenue made returns for said University of Georgia Athletic Association of admissions tax due and owing by it for said months of September and October, 1934, showing admissions taxes due and owing thereon, amounting to $895.37, and an assessment in said amount was thereafter duly made by the Commissioner of Internal Revenue against Charles E. Martin, Trustee, University of Georgia Athletic Assn., University of Georgia Department of Athletics, all of Athens, Georgia.

X.

Upon the assessment of said tax, the defendant as Collector of Internal Revenue demanded payment of the same of the said Charles E. Martin, Trustee, University of Georgia Athletic Assn., University of Georgia Department of Athletics, and each of them, but said parties and each of them neglected and refused and still neglects and refuses to pay the same or any part thereof, and said tax and the whole thereof remains unpaid.

XI.

During the months of September and October, 1934, athletic games and contests were held or played in and upon an athletic stadium situated upon the grounds or campus of said School of Technology, to which the general public was admitted as spectators upon payment of admission charges usually evidenced by tickets, which admission charges were collected and sold by said admission charges were collected and sold by said Georgia Tech Athletic Association, acting through one Dr. A. H. Armstrong. During said months of September and October, 1934, such games or contests were held in said stadium, and the funds derived from the collection of admissions or from the sale of tickets to such games and athletic events were collected and held by said Georgia Tech Athletic Association. The tickets sold by said Georgia Tech Athletic Association to spectators to be used by them in gaining admission to said stadium to witness said games or contests had printed on the front or face thereof the words "Admission Price....." (with the amount

stated in accordance with the location of the seat to be occupied by the spectator), "Government Tax....." (with the percentage of the admission price due as tax stated), and "Total....." (being the total of Admission and Tax). Printed or stamped on the reverse side of each of such tickets, there appeared the following statement:

> Georgia School of Technology, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount collected as a tax as shown on the opposite side of this ticket will therefore be be retained by the School of Technology as a part of the admission unless it is finally decided that it is liable for the tax.

Upon each of said ticket so sold and for each admission so sold said Georgia Tech Athletic Association collected from the purchasers of such tickets or admissions, in addition to the admission price, an amount equal to ten per cent of said admission price as and for the the admission tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, being the amount designated on said tickets as "Government Tax".

XII.

Neither the complainant, the Georgia School of Technology, nor the Georgia Tech Athletic Association, nor any other person, made any returns of taxes so collected and required by law to be so collected to the defendant as Collector of Internal Revenue under

Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932. The said Georgia Tech Athletic Association kept the amounts so collected as tax separate and apart from all other funds and deposited the same to the credit of said Association in the First National Bank of Atlanta, Georgia. The amount so collected as tax by said Georgia Tech Athletic Association during the months of September and October, 1934, was $3,914.63, no part of which has been paid to the defendant or to the United States.

XIII.

Upon the failure of said Georgia Tech Athletic Association or the said Dr. A. H. Armstrong to make the returns and pay the tax on said admissions, the defendant as Collector of Internal Revenue made returns for said Georgia Tech Athletic Association of admissions tax due and owing by it for said months of September and October, 1934, showing admission taxes due and owing thereon amounting to $3,914.63, and assessment of said amount was thereafter made by the Commissioner of Internal Revenue against Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), all of Atlanta, Georgia.

XIV.

Upon the assessment of said tax as aforesaid, the defendant as Collector of Internal Revenue demanded payment of said tax of the said Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), and each of them, but said parties and each of them neglected and refused and still neglect and refuse to pay the same or any part thereof, and said tax and the whole thereof remains unpaid.

XV.

During the months of September and October, 1934, the total admission charges collected, exclusive of Federal taxes to athletic games and contests, by said University of Georgia Athletic Association was not less that $8,953.70.

XVI.

During the months of September and October, 1934, the total admission charges collected, exclusive of Federal taxes to athletic games and contests, by said Georgia Tech Athletic Association was not less that $39,146.30.

XVII.

On or about October 24, 1934, and subsequent to the assessment of the taxes due the United States by said University of Georgia Athletic Association for said months of September and October, 1934, said defendant, as Collector of Internal Revenue, duly filed for record in the office of the Clerk of the District Court of the United States for the Northern District of Georgia, and also in the office of the Recorder of Clarke County, Georgia, a notice of tax lien on all the property of said University of Georgia Athletic Association as authorized by Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928.

XVIII.

Upon the failure and refusal of the University of Georgia Athletic Association to pay said taxes due the United States, the defendant as Collector of Internal Revenue issued a warrant for distraint which he placed in the hands of a Deputy Collector of Internal Revenue for said District for service thereof, which Deputy Collector of Internal Revenue served the same on or about October 24, 1934, upon Charles E. Martin as an officer of the said University of Georgia Athletic Association, and thereupon and on said date served on said Charles E. Martin two notices and demands for tax, demanding payment from said Charles E. Martin or from said University of Georgia Athletic Association the sum of $895.37 for admission taxes due on account of admissions collected by said Association during the months of September and October, 1934, and thereupon and on said date levied upon the

money, credit, bank deposit, and bank account property rights of the said University of Georgia Athletic Association in the Citizens and Southern National Bank of Athens, Georgia, and demanded payment and delivery to said defendant as Collector of Internal Revenue the said sum of $895.37, admissions tax, and that said bank failed and refused to deliver said sum or any part thereof to the defendant although said bank admitted that it had on deposit to the credit of "Charles E. Martin, Trustee" the sum of $1,119.71, which is the account in which was deposited the admissions taxes collected by said Charles E. Martin or said University of Georgia Athletic Association for the months of September and October, 1934.

XIX.

On October 25, 1934, and subsequent to the assessment of the taxes due the United States by said Georgia Tech Athletic Association for said months of September and October, 1934, said defendant as Collector of Internal Revenue duly filed for record in the office of the Clerk of the District Court of the United States for the Northern District of Georgia and also in the the office of the Recorder of Fulton County, Georgia, a notice of tax lien on all the property of said Georgia Tech Athletic Association as authorized by Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928.

XX.

Upon the failure and refusal of the Georgia Tech Athletic Association to pay said taxes due the United

States, the defendant as Collector of Internal Revenue issued a warrant for distraint which he placed in the hands of a Deputy Collector of Internal Revenue for said District for service thereof, which Deputy Collector of Internal Revenue served the same on or about October 25, 1934, upon Dr. A. H. Armstrong as an officer of the said Georgia Tech Athletic Association, and thereupon and on said date served on said Dr. A. H. Armstrong two notices and demands for tax, demanding payment from said Dr. A. H. Armstrong or from said Georgia Tech Athletic Association the sum of $3,914.63 for admission taxes due on account of admissions collected by said Association during the months of September and October, 1934, and thereupon and on said date levied upon the money, credit bank deposit, and bank account property rights of the said Georgia Tech Athletic Association in the First National Bank of Atlanta, Georgia, and demanded payment and delivery to said defendant as Collector of Internal Revenue the said sum of $3,914.63 admissions tax, and that said bank failed and refused to deliver said sum or any part thereof to the defendant although said bank admitted that it had on deposit to the credit of "Georgia Tech Athletic Association" the sum of $3,914.63, which is the account in which was deposited the admissions taxes collected by said Dr. A. H. Armstrong or said Georgia Tech Athletic Association for the months of September and October, 1934.

XXI.

On or about November 30, 1932, there was filed in the office of the Collector of Internal Revenue for the

Collection District of Georgia on Treasury Form 729 by Georgia Tech Athletic Association, verified by Floyd Field, Treasurer, a return of admissions taxes for the month of October, 1932, on account of admissions to athletic events held at the School of Technology during said month, amounting to $5,111.37, and said Georgia Tech Athletic Association paid said tax on December 1, 1932.

XXII.

On or about December 21, 1932, there was filed in the office of the Collector of Internal Revenue for the Collection District of Georgia on Treasury Form 729 by Georgia Tech Athletic Association, verified by Floyd Field, Treasurer, a return of admissions taxes for the month of November, 1932, on account of admissions to athletic events held at the School of Technology during said month, amounting to $5,848.80, and said Georgia Tech Athletic Association paid said tax on December 23, 1932.

XXIII.

Thereafter and on or about July 11, 1933, said Georgia Tech Athletic Association filed with the Commissioner of Internal Revenue a claim for refund for $11,181.62 for admissions taxes for the month of October and November, 1932, and January and February, 1933, upon the ground that the Georgia Tech Athletic Association is an instrumentality of a political subdivision of the State of Georgia and exempt from the imposition of the Federal admissions tax. Said claim for refund was thereafter rejected by the Commissioner of In-

ternal Revenue, of which rejection the said Georgia Tech Athletic Association was advised by letter dated October 11, 1933. Said claim for refund was rejected upon the ground that said admissions were not exempt from taxation by reason of the provisions of subdivision (e) of Section 500 of the Revenue Act of 1926, which was added by Section 711 (c) of the Revenue Act of 1932.

Upon the foregoing special findings of fact, which are hereby made a part of the judgment and decree herein, the Court finds and enters the following:

CONCLUSIONS OF LAW

I.

That the equities are with the defendant.

II.

That the plaintiff has failed to sustain the burden of proving a cause for equitable relief in its favor against the defendant.

III.

That the pleadings and the evidence in this case are insufficient in law to sustain a judgment and decree in favor of the plaintiff and against the defendant.

IV.

That under the law and the evidence the University

of Georgia Athletic Association, its officers, agents, and employees, and the Georgia Tech Athletic Association, its officers, agents, and employees have collected for the United States of America admission taxes upon athletic games and events held during the months of September and October, 1934, in the respective amounts of $895.37 and $3,914.63, on account of taxes imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, which said respective amounts are special funds in trust for the United States, pursuant to the provisions of Section 607 of the Revenue Act of 1934.

V.

That under the law and the evidence the taxes involved in this proceeding were lawfully assessed by the Commissioner of Internal Revenue against the University of Georgia Athletic Association, Charles E. Martin, Trustee, University of Georgia Department of Athletics, and against Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), respectively, and each of them.

VI.

That under the law and the evidence the admissions to the athletic games or contests held or played at the University of Georgia and at the School of Tech-

nology during the months of September and October, 1934, to which the public was admitted upon the payment of an admission charge and participated in by students in attendance at said University and at said School of Technology, respectively, were subject to the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932.

VII.

That under the law and the evidence the tax imposed by Section 500 (e) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, is not a direct tax but is a tax on admissions which is paid by the purchaser.

VIII.

That under the law and the evidence, if the State of Georgia or complainant has any interest in the funds derived from the proceeds of admissions charged and collected from spectators admitted to athletic games or contests held or played at the University of Georgia or at the School of Technology and participated in by students in attendance at said University or at said School of Technology in competition with students in attendance at other colleges and universities; and if the State of Georgia or complainant is engaged in carrying on said intercollegiate contests and charging admissions thereto, it or they to that extent are acting as a private corporate individual engaged in a commercial enterprise.

IX.

That under the law and the evidence neither the State of Georgia, the Regents of the University System of Georgia, the University of Georgia, the University of Georgia Athletic Association, the School of Technology, nor the Georgia Tech Athletic Association has any right, title, or interest whatsoever in or to any part of that part of the proceeds of admissions to athletic contests and games, collected during the months of September and October, 1934, from spectators as a Federal tax by the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, upon the admissions to such games held or played at said University or at said School of Technology.

X.

That the complainant is not a department of the State government of Georgia.

XI.

That neither the complainant, the University of Georgia, the University of Georgia Athletic Association, Charles E. Martin, the School of Technology, the Georgia Tech Athletic Association, nor Dr. A. H. Armstrong, nor either or any of them, nor any person or persons acting by, through, or for them, or any of them, in the promoting, sponsoring and/or holding of intercollegiate athletic contests between teams composed of students of the University of Georgia and/or School of Technology and teams composed of students of

other colleges and universities, or between teams composed of their own students, respectively, to which the public is admitted upon the payment of an admission charge and for which an admission charge is made, is a governmental agency engaged in carrying out an essential governmental function, and no part of the funds involved in this proceeding is the property of complainant or subject to its use for any purpose whatsoever.

XII.

That this suit is specifically prohibited by the provisions of Section 3224, Revised Statutes.

XIII.

That complainant has a plain, adequate and complete remedy in the ordinary course at law.

XIV.

That there is no actual controversy between complainant and defendant or between any parties over which this Court has jurisdiction within the purview of the Declaratory Judgement Act.

XV.

That this proceeding is not authorized by the provisions of the Declaratory Judgement Act and cannot be maintained.

XVI.

That under the law and the evidence the complainant is not entitled to the releif prayed for in a court of equity.

XVII.

That under the law and the evidence the record does not contain any substantial evidence to sustain findings of fact and conclusions of law and decree in favor of the plaintiff and against the defendant.

XVIII.

That the pleadings and the evidence in this case, with every inference that may be drawn from it, are insufficient in law to sustain a judgment and decree in favor of the plaintiff and against the defendant.

XIX.

That the defendant, on the pleadings and the evidence in this case, is entitled to judgment and decree in its favor against the plaintiff dismissing the bill of complaint.

In the event the Court fails or refuses to make, adopt, or enter the foregoing findings of fact and conclusions of law or any thereof, defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts to any ruling and action of the Court in making and entering any

other findings of fact and conclusions of law or either thereof.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

Filed Sept. 15, 1936.

TITLE OMITTED.

ORDER OVERRULING DEFENDANT'S MOTION OF SEPTEMBER 15, 1936 TO DISMISS

The defendant having at the conclusion of the complainant's evidence presented a written motion to dismiss the complainant for the reasons appearing in said motion; it is now, after argument of counsel upon said motion, ORDERED AND ADJUDGED AND DECREED that the said motion be and the same is hereby overruled and denied.

This the 16th day of September, 1936.

E. MARVIN UNDERWOOD,
U. S. JUDGE.

Filed September 16th, 1936.

TITLE OMITTED.

COMPLAINANT'S REQUEST FOR FINDINGS OF FACT

Comes now the Complainant and requests the court to make the following findings of fact:

1. This is a suit in equity, arising under the Internal Revenue Laws of the United States.

2. Complainant is an agency and instrumentality of the State of Georgia, reincorporated by an Act of the Georgia Legislature in the year 1931.

3. Defendant, W. E. Page, is a citizen and resident of Atlanta, Georgia, in the Northern District of Georgia, and is Collector of Internal Revenue.

4. The University of Georgia and the School of Technology are branches of the complainant, so made by an Act of the Georgia Legislature in the year 1931.

5. The program of education at each of said branches is and was, during the year, 1934, adopted by the faculties of said two branches and approved by the president of each of said two branches.

6. Said program of education at each branch was threefold, namely: mental training, moral and spiritual development, and physical development, the entire program in each respect being under the direct and sole supervision of the faculty of each of said branches.

7. The program of education at each of said two branches was in turn approved by the Board of Regents of the University System of Georgia, the complainant herein.

8. Included in the program of Physical education were intermural athletics and intercollegiate athletics.

9. Approximately 80% of the male students at each of said branches engaged in the program of physical education during the year 1934. Approximately 30% of the student body of each branch engaged in the intercollegiate athletic educational part of the program.

10. At both branches participation in the physical education program is required of all students who cannot qualify for R. O. T. C. training.

11. At the branch known as the University of Georgia in Athens, Georgia, participation in intercollegiate athletics is given credit towards the degree of Bachelor of Science in Physical Education.

12. The physical education program likewise includes all women students, there being thirty courses in physical education for women.

13. The expenses and costs of the physical education program at each branch are made possible through admissions to athletic contests engaged in by teams representing the respective branches, together with a student's fee collected from each student at each branch, all of which sums are used for said purposes.

14. Without such admission charges and student fee the physical education at each branch could not be carried on.

15. During the year 1934, each ticket of admission to such athletic events at the branch, the University of Georgia, contained the following notice:

> "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. The amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

the same notice appearing on all of the tickets of admission to athletic contests at the School of Technology, except the name "School of Technology" is inserted in lieu of the name "University of Georgia."

16. 10% of the admissions collected by the Athletic Association of each such branch was placed in the various bank accounts belonging to the complainant, but nominally in the names, respectively, as follow: Charles E. Martin, Agent; University of Georgia Department of Athletics; Athletic Association of the University of Georgia, and Athletic Association of the School of Technology.

17. The defendant, during October, 1934, levied upon said bank accounts in the manner described in

the complainant's Bill of Complaint, in an effort to collect either: admission taxes which under the Revenue Acts of 1926 and 1932 are imposed on the individuals buying admissions, or, penalties for refusing to collect such tax.

18. During the year 1932 the complainant, through one of its said branches, the School of Technology, filed an admissions tax return and paid a tax representing 10% of admissions collected during a portion of the year 1932, and thereafter filed claim for refund on behalf of complainant with the Treasury Department of the United States.

19. Said claim for refund was denied by the Commissioner of Internal Revenue on the ground, among others, that the complainant's said branch was not the taxpayer on whom the tax was imposed by law.

Respectfully submitted,

HAROLD HIRSCH & MARION SMITH,

M. E. KILPATRICK,

Attorneys for Complainant.

Filed Sept. 15, 1936.

TITLE OMITTED.

COMPLAINANT'S REQUEST FOR CONCLUSIONS OF LAW

Complainant, through its counsel, respectfully requests the Court to make the following conclusions of law:

1. Complainant, Regents of the University System of Georgia, is a governmental corporation created by the State of Georgia by public laws as an agency and instrumentality of the State to carry on for the State the University System of the State and for no other purposes.

2. The governing board of said complainant, to-wit: Board of Regents of the University System of Georgia, is a department of government of the State of Georgia, and the members of said board are public officers of the State of Georgia.

3. The title to all property of every nature whatever and of all funds, including funds of the Athletic Association or any of its branches of the said Regents of the University System of Georgia are held by said complainant as an agent and instrumentality of the State of Georgia, and are public funds of the State of Georgia.

4. The complainant was given, by said Act, full authority to adopt and approve such rules and regulations and courses of study in connection therewith in its educational program as it saw fit.

5. The admissions to athletic contests collected by the two said branches of the complainant during 1934 were and are the funds of the complainant, a branch of the government of the State of Georgia.

6. The complainant nor either of its said two branches nor any department of either branch, during the year 1934, collected any taxes for the Federal Government, and all of the funds collected by way of admissions belong to the complainant.

7. The program of education of the two said branches of the University of Georgia, including the physical education program, including intercollegiate athletics at which admissions were charged, was an essential governmental function of the State of Georgia.

8. That the complainant nor its two branches nor any department thereof, is liable for any Federal admissions tax or penalty for failure and refusal to collect any such tax.

9. That no taxes are due by the persons paying such admissions, in that the same would constitute an interference with and a burden upon the said governmental function of the State of Georgia.

10. Complainant is entitled to the injunction prayed for.

Respectfully submitted,

HAROLD HIRSCH & MARION SMITH,
M. E. KILPATRICK,
Attorneys for Complainant.

Filed Sept. 15, 1936.

TITLE OMITTED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case having come on for hearing upon its merits and evidence having been introduced, arguments of counsel had and briefs filed, the Court now finds:

FINDINGS OF FACTS.

1. Complainant is a public corporation and an instrumentality of the State of Georgia, incorporated by an act of the Legislature of Georgia in the year 1931. The University of Georgia and the School of Technology are branches of complainant, so made by said Act, each of which colleges is and at all times herein mentioned has been operated under the supervision and control of complainant.

2. Defendant W. E. Page was appointed United States Collector of Internal Revenue for the Collection District of Georgia on June 20, 1933, and ever since that date has been and now is the duly appointed, qualified and acting Collector of Internal Revenue for said District.

3. During the times alleged in the bill of complaint there was maintained at the University of Georgia and at said School of Technology, athletic associations, incorporated by law, which was known as University of Georgia Athletic Association and Georgia Tech Athletic Association respectively, except that the Georgia Tech Athletic Association operated

as an unincorporated association prior to March 8th, 1934, the date of its incorporation. Both associations have always functioned through a Governing Board composed of an equal number of faculty members and alumni of the respective colleges. These associations have control of physical education and athletic games at said colleges, including intercollegiate contests in football, to which spectators are admitted upon the payment of admission charges of varying amounts.

4. All health and athletic programs of the said two colleges were, during the year 1934, adopted and supervised by the faculties of said colleges, and approved by each of their Presidents, and were, in turn, approved by complainant.

5. The health and athletic programs of the colleges included both intermural and intercollegiate Athletics; and approximately eighty per cent. of the male students in each college engaged in some manner in the program of physical education during the year 1934. Approximately thirty per cent. of them engaged in intercollegiate athletics.

6. At both colleges participation in the physical education is required of all students that cannot qualify for R. O. T. C. training.

7. The physical education program also includes the women students, there being thirty courses in physical education for women.

8. The expenses of physical education and athletic

programs at each college are supported in large measure from admission charges to athletic contests. In addition, a small student's fee is collected from each student, which is used for such purpose. The entire expenses of physical education and athletic programs in the two colleges are met by said admission charges and student's fees.

9. During and since the year 1934, each ticket of admission to such athletic events at the University of Georgia, contained the following notice:

> "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

The same notice appeared on all the tickets of admission to athletic contests at the School of Technology, except the name "School of Technology" is inserted in lieu of the name "University of Georgia."

10. Neither complainant nor either of said athletic associations, or any other of complainant's branches or instrumentalities made any returns to defendant of the amounts stated on the admission tickets as a tax, but both associations kept all amounts so collected separate and apart from all other funds and deposited them to their respective accounts, the amount

so collected by the University of Georgia Athletic Association, to-wit: $895.37, being deposited in the Citizens & Southern National Bank in Athens, Georgia, and the amount collected by Georgia Tech Athletic Association, $3,914.63, being placed in the First National Bank, in Atlanta, Ga.

11. No part of either of these sums has been paid to defendant or to the United States.

12. Upon failure of complainant and its branches and instrumentalities to make returns and pay taxes on said admissions, defendant made returns of same, claimed as due and owing for the months of September and October 1934, amounting to $895.37 from the University of Georgia Athletic Association, and amounting to $3,914.63 from Georgia Tech Athletic Association. Assessments of said amounts were thereafter made by defendant.

13. Upon failure of complainant and its branches and instrumentalities, including the two athletic associations, to pay, upon demand of defendant, the said amounts claimed as taxes, defendant issued warrants for distraint. One of these, relating to the University of Georgia Athletic Association, was served on October 24, 1934, upon Charles E. Martin as an officer of said association, as were also two notices and demands for payment by him or the University of Georgia Athletic Association of the sum of $895.37 for admission taxes for the months of September and October, 1934. On the same date defendant also levied upon the money and bank deposit of said association in the Citizens & Southern National Bank. The Bank failed

and refused to deliver said $895.37 to defendant, although it held this amount of funds belonging to said association. The other warrant, relating to the Georgia Tech Athletic Association, was served, October 25, 1934, upon Dr. A. H. Armstrong as an officer of said association, as were also two notices and demands for the payment by him or said association of the sum of $3,914.63 for admission taxes alleged to be due on account of admissions collected during the months of September and October 1934. On the same day defendant levied upon the money and bank deposit of said association in the First National Bank of Atlanta and demanded payment and delivery of said $3,914.63. The bank failed and refused to deliver same to defendant although it had the amount on deposit to the credit of the association.

14. The ten per cent. of the admissions collected by the two athletic associations placed in the bank accounts maintained by said associations respectively, but nominally in the name of Charles E. Martin, Trustee, University of Georgia Athletic Association, University of Georgia Department of Athletics, and Athletic Association of University of Georgia; and Georgia Tech Athletic Association.

15. During the year 1932 the Georgia Tech Athletic Association filed an admission tax return, verified by Floyd Field, Treasurer, and paid a tax representing ten per cent. of admissions collected during a portion of the year 1932. Thereafter the association filed claim for refund on behalf of complainant with the Treasury Department of the United States. This claim for refund was denied.

CONCLUSIONS OF LAW

At the first trial this Court held, in sustaining the motion to dismiss, that the allegations of the petition did not set forth a cause of action and did not show that the conduct of the athletic games in questions by complainant, through the agency of the two athletic associations, was an operation of the State essential to the execution of its governmental functions, but on the contrary showed that same was not such governmental function, and that the tax in question was valid and that the suit should be dismissed.

Upon appeal the decree was reversed and the Circuit Court of Appeals held that "We are of opinion that complainant has stated a case for equitable relief" and directed that an interlocutory injunction issue and the case be heard on its mreits. (Regents of the University System of Georgia v. Page, 81 F(2nd) 577.)

Upon the trial on the merits, evidence was introduced which I find fully sustained the allegations of the petition.

As I construe the opinion of the Circuit Court of Appeals, the facts proved being the same as those alleged and only expanded to establish the allegations in greater detail, it requires a finding by this Court in favor of complainant and against the asserted claim of liability for the tax or obligation to collect it. While the Circuit Court of Appeals stated in its opinion that a ruling on this question would be premature, nevertheless I construe the opinion to mean that, if

the facts alleged in the petition were proved, a decision to the above effect must follow and an injunction issue.

Therefore, upon authority of the decision of the Circuit Court of Appeals, which I must, of course, follow, I file these conclusions of law:

1. Complainant, though a distinct legal entity, is a governmental corporation, created by the State of Georgia for the purpose of having supervision of the public higher institutions of learning in the State and to conduct the University System of the State.

2. The title to all property of every nature whatever and all funds held by complainant, directly or by its agents and instrumentalities, including the funds of said athletic associations, are held by complainant as an instrumentality of the State of Georgia and are the property and funds of the State of Georgia.

3. Complainant was given by the Act creating it, full authority to establish and approve such rules and regulations and courses of study in its educational program as it saw fit.

4. The adoption, direction and supervision by complainant, acting directly or through its agents and instrumentalities, of the program of education at the two branches of the University System of Georgia, the University of Georgia and the Georgia School of Technology, including the promotion of physical training as an intergral part of its educational activities, including intercollegiate athletic contests

such as football, and the collection of admission fees at games when admission fees were charged, were, under the decision of the Circuit Court of Appeals in this case, the exercise of an essential governmental function of the State of Georgia; and there existed no liability upon it or its agents or instrumentalities for any Federal admission tax or penalty for failure and refusal to collect any such tax, and an injunction should issue restraining the defendant from attempting to collect the alleged taxes, debt, or penalties, except by due proceedings in a court of competent jurisdiction.

Let a decree in conformity with the above findings be prepared and submitted to the Court.

This January 6th, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed Jan. 6, 1937.

TITLE OMITTED.

FINAL DECREE

Pursuant to the opinion and findings herein, that there is no liability upon complainant or its agents or instrumentalities for any Federal admission tax or penalty for failure and refusal to collect any such tax, IT IS CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, his agents,

deputies, servants and employees, be and they are hereby permanently enjoined and restrained from further proceedings under levies and warrants for distraint referred to in the Bill of Complaint.

IT IS FURTHER ORDERED and DECREED that said levies and warrants for distraint be and they are hereby cancelled, and the liens thereby created are likewise cancelled.

This the 14th day of January, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed Jan. 14, 1937.

TITLE OMITTED.

MOTION TO REPRODUCE PARTS OF THE TESTIMONY IN THE VERBATIM FORM

Comes now W. E. Page, Collector of Internal Revenue, the above named defendant, by Lawrence S. Camp, United States Attorney for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his solicitors of record, and respectfully moves the Court to direct that parts of the Statement of Evidence prepared by defendant and lodged with the Clerk of this Court this day, which show a reproduction of the testimony in the exact words of the witnesses in question and answer form, shall be reproduced in

the exact words as such witnesses in question and answer form in the Statement of Evidence to be filed in connection with the appeal this day allowed in the above entitled cause, for the reason that the parts of said Statement which show a reproduction of the testimony in the exact words of the witnesses in question and answer form were and are desired by the defendant, and are necessary to accurately reflect what occured and for a proper understanding of the questions presented by the appeal.

Dated this 3rd day of April, 1937.

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

Filed April 13, 1937.

951

TITLE OMITTED.

ORDER DIRECTING THE REPRODUCTION OF PARTS OF THE TESTIMONY IN VERBATIM FORM

On Motion of W. E. Page, Collector of Internal Revenue, defendant and appellant in the above entitled cause, and in view of the nature and character of the testimony,

IT IS HEREBY ORDERED and directed that, in making up the record on appeal, that part of the testimony of the Witnesses H. J. Stegeman, Charles E. Martin, Dr. A. H. Armstrong, Dr. M. L. Brittain, and Dr. S. V. Sanford, shown in the Statement of Evidence prepared by the defendant and lodged with the Clerk of this Court, which show a reproduction of the testimony of the witnesses in the exact words of such witnesses in question and answer form, shall be so reproduced in the exact words of the witnesses in the form of questions and answers as set forth in said Statement of Evidence.

Dated this 13th day of April, 1937.

E MARVIN UNDERWOOD,
District Judge.

Filed April 13, 1937.

(Title Omitted)

STATEMENT OF EVIDENCE

BE IT REMEMBERED that the above entitled cause came on regularly for trial before the above entitled Court, sitting in Equity, commencing on the 14th day of September, 1936, and ending on the 16th day of September, 1936, upon the issues formed by the bill of complaint, and amendments thereto, and the answer thereto, Marion Smith, Esquire, and M. E. Kilpatrick, Esquire, appearing as solicitors for complainant, and Lawrence S. Camp, Esquire, United States Attorney, M. Neil Andrews, Esquire, Assistant United States Attorney, and M. H. Eustace, Esquire, Special Assistant to the Attorney General, appearing as solicitors for defendant.

COMPLAINANT'S CASE

H. J. STEGERMAN, a witness called on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KILPATRICK:

My name is H. J. Stegerman. In the University of Georgia I hold the positions of Dean of Men Students and Director of Athletics. I have held the position of Dean of Men about eight years, and the position of Director of Athletics about ten years. As head of athletics I have charge at the University of intercollegiate athletics, intra-mural sports, and physical education branches of activities. The com-

plete athletic activities at the University of Georgia are as follows: The University conducts intercollegiate athletics and intra-mural sports in such branches as football, baseball, golf, tennis, swimming, cross country track, boxing, and a few other similar sports. Other than intercollegiate athletics, the athletic program consists of intramural athletics and physical education. By intramural athletics is meant athletics for students within the University separate from intercollegiate athletics. As examples of intramural activities, students are formed in groups along the line of fraternity teams or dormitory teams, class teams or teams from the military organizations, which teams play each other in whatever sport is current during that season. With respect to other forms of physical education at the University, there are required classes which every man must take, and certain courses are required by University rules to be taken by them. We made out a record of the number of students participating in the athletic program at the University for 1934, which we do for every year. I have a copy of the report with me. During the year 1934, approximately thirty per cent of male students at the University engaged in intercollegiate athletics.

During the same year, approximately seventy-five per cent of the male students of the University engaged in the intramural part of the athletic program. Inter-fraternity activities are included within the term "intramural." From the standpoint of numbers, approximately 1,858 students engaged in intramural athletics in 1934. That was approximately

eighty per cent of the student body. The athletic program at the University of Georgia is adopted by the faculty and presented to the Board of Regents for approval. The faculty had a great number of rules covering athletic activities in 1934. Those rules were published. The pamphlet which you are handing me (Plaintiff's Exhibit 1) is a set of regulations for the guidance of undergraduate students for the year 1935-36. We had a similar set of rules for 1934, as we have every year. There were very slight changes in the rules year by year. That set of rules was adopted by the faculty of the University of Georgia.

I am on the faculty of the University of Georgia in Athens. In 1934, the football instructors at Georgia were Mr. Mehre and Mr. Enright, and Mr. Twomey. As an assistant instructor we had a Mr. Baskin. There were several other instructors in the general athletic program which I have outlined. Those instructors or so-called football coaches, were members of the faculty at that time. They were members of the faculty in the University of Georgia in their capacity as football coaches and as instructors in the Department of Physical Education, four members. They had regular classes in the course of Physical Education. These classes were regularly attended. As to how often these classes were held, the Junior College classes met five days a week, and six days for the Senior, exactly the same number of classes to meet as approved by the Board of Regents. At these regular classes, they teach methods and practice and rules and theory for coaching sports for

high school coaching, and for men planning going into teaching and coaching positions. Classes were selected by the boys registered, or they were assigned to them by the Registrar of the University, if they desired to take that course, depending upon the degree for which they were studying. They do not give any football or athletic degree. The schedule in education, for those who major in Physical Education, invited men, who desire to teach, and it entitled the men to teach in our state high schools. The size of a class is given in the catalogue. The catalogue shows the entire list. It does not show the number of students, but the description of courses by numbers.

BY THE COURT: How many pupils followed those courses?

A. The attendance was between 42 and 45. That was about the general average.

Q. Were they confined to football players?

A. No, sir; any student that desired to take those courses.

The intercollegiate program does not include the girls. So far as girls are concerned, the School of Physical Education has another department for women. That composed the type of athletics such as outdoor hockey, swimming, horseback riding, rifle shooting, tennis and slightly more moderate sports. So far as male students are concerned, there is a requisite for taking some form of physical education

order to qualify for R.O.T.C. training. No stu-
nt can be graduated from the University without
o years of physical education, if he does not take
litary training. That physical education is in-
ded in the physical education program which I
ve conducted. These courses are set out in the
letin of the University of Georgia. The Athletic
ogram of education starts with page 218 and con-
ues through part of 220. Plaintiff's Exhibit 2 is
general catalogue published by the University of
orgia faculty for 1934.

On pages 324 and 327 are the rules which the
iversity laid down for eligibility for competition
athletics. A student cannot engage in intercol-
iate athletics without the approval of the faculty
mmittee and Dean of the University. A student
not permitted to engage in athletics unless he has
ertain grade in his work. The University require-
nt is that he must have a passing grade in two
urses of the three he is required to carry. The
letic faculty committee in 1934 was a committee
ointed by the President of seven members of the
ulty. They were Professor Payne, Professor T.
McWhorter, Professor W. D. Hooper, Professor
W. Scott, and myself. In the intercollegiate ath-
c contests admissions were charged to persons
ending those games in 1934. The business man-
er of the Athletic Association at the University
lected those admissions.

The Athletic Association is an organization,
ich is formed—it is a group of Directors, which is
ten together, organized—for the purpose of bor-

rowing money to build our physical plant, and for arousing interest in athletics, and interest in physical education.

The President of the University fixes the salaries of the physical education instructors at the University of Georgia.

BY THE COURT: Is the Athletic Association a corporation? A. Yes, sir.

MR. SMITH: They have a charter and by-laws.

In fixing the admissions to those games and determining the charges, we are required by the Board of Regents to make out a budget every year, outlining our probable expenses. Then we more or less estimate our possible receipts for the year and base our admission charges on that estimate. Those proceeds from admissions are used for the maintenance of the physical plant. To illustrate: Within the last number of years, we have built a large stadium costing a considerable amount of money which belongs to the University. We have built two gymnasiums, a series of tennis courts, and a baseball field. In general it is building and playing fields for students. The salaries to the physical education instructors comes partly from the University and partly from the Athletic Association.

That is, part is appropriated by the legislature and part from the University. At one time the athletic fund was used to pay salaries of professors in other departments. At one time, when the Athletic Association had a surplus, it went into the general

funds of the University, when the University was short of money. A very large amount was taken over one year.

BY THE COURT: Was that taken over as a loan or credit or a payment to be made by the University to the Athletic Association?

A. Supposedly a loan, but it has never been repaid, and there is no possible possibility of it ever being repaid. It was though as a loan from the Athletic Association. It was more in the form of a gift by the Athletic Association. There were no papers executed, and no agreement made about it.

Those funds are not used for any other purpose of the University of Georgia besides salaries and equipment, and salaries in other depattments. Some of those funds were used for conducting general student meetings or student dances, for the Athletic Association provides all facilities for holding University social functions, which is one item.

BY THE COURT: Are those dances and other social entertainments free to the students, or do they pay admission?

A. They pay a nominal admission.

Q. How much of the cost of those entertainments do the paid admissions cover?

A. I would say probably two-thirds of the cost.

Q. Are the contributions from the Athletic Asso-

ciation in the form of a gift or loan?

A. They are in the form of buildings and services. They don't contribute any money. We contribute our physical plant, and give them all the labor necessary.

The funds with which medical supplies are taken care of come partly from the University budget, partly from the fee which is charged to students as an infirmary fee and from payments by students, additional fees of students who get sick, and from gifts of equipment that have been made at different times. The medical supplies that we use and the surgical supplies, such as diathermy machines and X-ray machines, go to the University after the football season is over. The funds come from Athletic Association funds.

The Athletic Association receives its funds, on which it runs, other than admissions, partly from the tuition paid in. I cannot tell how much. A fee is charged each student, which is allocated by the President of the University to certain activities, and a share of that is allocated to us for use in running the athletic program. I mean the athletic department. What I have testified to applies now as well as in 1934.

The Exhibits F and G in the bill of complaint are a list and description of the courses given both during the year and during the summer session at the University. Those are for the year of 1933-34. The next Bulletin found in Exhibit G is a list of courses

given by the Peabody School of Education. Those courses were first adopted by the Curriculum Committee of the University, then by the faculty, and approved by the Board of Regents. Mr. Mehre, head coach of the football team, instructs in this department. Other coaches instructing in this department are Mr. Enright, Mr. Smith, and Mr. McAllister. I have been interested as an instructor or in charge of athletics for about twenty-two years. I was on the committee that adopted or approved this athletic program which I have described. When I refer to the University, my testimony relates to the branch at Athens known as the University of Georgia.

CROSS-EXAMINATION BY MR. EUSTACE:

I testified that my present position is dean of men students. I have served in that capacity about six or seven years. The other position I held in the University of Georgia is Director of Athletics. I am also a member of the Board of Directors of the Athletic Association. I was not one of the original incorporators of that organization. It was reincorporated in 1928. At the time it was reincorporated, I was one of the incorporators.

I have testified that I was a member of the Board of Directors of the University of Georgia Athletic Association. I have occupied that position more than ten years. As to whether the Board of Directors of this Athletic Association holds meetings from time to time, and transacts the business of the Association at the meetings of the Board of Direc-

tors—there is very little business for them to transact. They keep minutes. As to the football games which were played between the students attending the University of Georgia and students of other schools during September and October, 1934, I would not be very accurate. I would have to look up the record or the schedules here. I can probably give you seven out of the ten. There were ten games played. Admissions were charged to all of those games. I have a record of the total amount of receipts that accrued from those games.

BY THE COURT: Has an audit been made of the Athletic Association?

A. Yes sir. It is made every year by the State Auditor.

Q. Does that show all funds received from athletic games, in which the University team participated?

A. Yes sir; receipts of every kind.

Q. Is that here?

A. I think it is here.

An audit is made every year by the State Auditor from the State Capitol, of the receipts and disbursements of the Athletic Association. An audit is made by the University Auditor every year for a different fiscal year, so we have two annual audits. The period covered by the audit made by the State Auditor is from September 1 to August 31. The period covered

by the faculty audit is, I think, from January 1 to December 31. We do not have semi-annual audits. I think that the audit made by the State Auditor for the period ending August 31, 1935, covers the period from September 1, 1934, to August 31, 1935. I do not know how long the State Auditor has been making audits of the affairs of the University of Georgia Athletic Association. I think it is required that he do so every year. I do not know whether or not the audit, "Defendant's Exhibit 1," and being the audit for the period ending August 31, 1935, is the first audit made by the State Auditor of those funds. My impression is that it has been done every year. I don't know whether this audit made for the last fiscal year by the State Auditor is the first one made.

Q. What credit towards a degree in the department of Athletics is given to a student for his participation in intercollegiate football?

A. Only the credit required to graduate, if he takes that course. There is a great variety of courses given, in which intercollegiate athletics are separated into different sports for the course.

Q. I understand your testimony to be that a student, who participates in intercollegiate football, by reason of that fact gets credit towards a degree for graduation?

A. No sir.

Q. Then no credit is given for participation in sports?

A. Under certain condition, yes sir.

Football is not required as a prerequisite to graduation and obtaining a degree in the department of Physical Education in the University of Georgia. A member of the so-called Varsity team, who participates in intercollegiate football might receive credit by reason of that participation towards his degree. I mean if he needs for graduation the course in Physical Education, then we cannot assign him to football, and get credit for it, but other men may be taking those courses in different departments, and therefore not eligible to get credit for it by playing football.

Football is not one of the required courses towards a degree in the University. It is participated in merely as a voluntary act on the part of the student.

BY THE COURT: I don't understand how he gets credit for his football playing.

A. Students cannot graduate without credit for two years of work in either military or physical education. Take a student, who on account of defective eye sight cannot take military training, and he is still physically fit to play football. If physically fit, he can play football for two years, and get the same amount of credit as if he had taken military training for two years.

If a student participates in military training during two years of his college course, he fulfills all the requirements necessary for graduation in the department of Physical Education, so far as the

two years' work is concerned.

If he played football, I mean that that is a substitute for the work he might do in the military department, if he is rejected for military training as a result of his physical examination. He would have to be rejected.

Q. Unless he can qualify as a student in the military department, or in some other physical activity, he is not entitled to any credits by reason of his participation in football?

A. Yes sir.

BY THE COURT: Does every student have to take military training?

A. All except a small group, who take the Pharmacy course. Those are the only ones exempt from physical education.

Q. Do all your football players take military training?

A. Unless they are rejected for defects.

Q. What percentage of them are rejected?

A. Between 80 and 140 a year.

Q. How many on your squad?

A. About 135 to 160.

Q. Practically all of them are rejected for mili-

tary training?

A. No. I mean out of the student body between 80 and 140.

Q. How many of the football players are rejected for military training.

A. Probably 10%. The records would show.

Q. The University official record would show that?

A. Yes sir.

Our records show how many football players actually carry out the complete course of military training. So far my testimony has been directed to those, who participate or who elect physical education as the course they are pursuing at the University. It is true that members of the Varsity Squad come from other departments of the University as well as the Department of Physical Education, some from the Law School, some from the Medical School, and some from the College of Arts and Sciences.

Between 5 and 10 per cent of the Varsity Squad in 1934 was made up of students from the department of Physical Education. I would think not more than 10%. And physical education is required as a requirement for graduation in other departments except that of Physical Education, it is required in all departments of the University, the law department as well as others.

Q. What is there about the Department of Physical Education as affects participation in athletic sports that is any different from any other department in the University?

A. The only difference is that, if it were not for receipts from athletics, there would be none. No appropriation is made by the State Legislature to go to the Department of Physical Education. If athletic contests were not carried on, we would have no department of Physical Education.

BY THE COURT: I understood you to say a while ago that the State appropriated funds, that are used for athletics at the University ?

A. No sir. That was in answer to a question about salaries. There is one salary appropriated, which amounts to $1200.00, the only appropriation made by the State for one purpose.

MR. SMITH: The State appropriation is by Act of the General Assembly, which is not a subject matter of testimony, but I can say that the State of Georgia does not segregate that appropriation for that purpose. It is appropriated in a lump sum for the University, and it is not appropriated for the department of Greek, Latin, Mathematics, or anything else. There is one lump sum appropriated.

Other athletic activities besides football which were carried on in the fall of 1934, to which admissions were charged were basketball, baseball, boxing, golf, and track. Those activities in some form or other extended throughout the entire year, ex-

cept the Summer session. The athletic fee that is required of all students at the University is approximately $10 a year. That is the amount that was charged in the Fall of 1934. The proceeds of those fees are used in the general operating fund of the Athletic Department

BY THE COURT: You stated the Athletic Department. Do you know of any difference between the activities of the Athletic Department and the Athletic Association?

A. No sir, I do not.

The Athletic Association is not a corporate entity, which is charged with the athletic activities. It has no jurisdiction over the athletic interests. I don't consider that it has any jurisdiction over football games and athletic activities.

BY THE COURT: Does this ten dollars, which each student pays, go to the Athletic Association?

A. Yes sir.

The student gets for that free use of all our gymnasiums, free hot and cold water for baths, free swimming pools, and towels, use of playing fields, and free admission to all games played on the University campus of all sorts.

That is to all games, for which charges are made. Students are not required to pay for football games, and no fees for basketball games, baseball games, boxing contests, golf or track. That fee entitles him

to admission to all on the campus. The number of contests held during a year, to which the student is admitted by reason of payment of that fee, I would say is in the neighborhood of 50 events, probably greater.

The athletic fee of ten dollars has never been allocated, those admissions are one of the benefits included.

Q. If the ten dollar athletic fee was devoted exclusively to charges for admission, to which the student would have to pay admission for athletic activities, but which he is entitled to attend free, as it is, he would be paying about five cents admission to each game?

A. I don't know how much it would be. It would be very little, just a nominal amount.

Besides coaching football, the football coach teaches physical education, courses in the theory and practice of coaching football. That is all in the Department of Physical Education. He does not devote any of his time to the teaching of any subject outside of that Department. The coach in the Fall of 1934 was H. J. Mehre. All of his salary is paid out of the proceeds of the funds of the Athletic Association.

BY THE COURT: What is his salary?

A. I think his salary is $7200.00; I am not sure. I think it is $7600.00.

Q. Does that represent all that he receives?

A. Yes sir.

Q. That is his entire compensation from all sources?

A. Yes, sir.

Q. What is the salary of the President of the University?

A. I don't know. I am not able to say.

Q. What does the Dean of Men get?

A. $2500.00.

Q. What does the Chancellor get?

A. I don't know.

MR. SMITH: I think possibly an erroneous impression is being left on your Honor's mind. He gets another salary besides as Dean of Men.

BY THE COURT: What is the other salary for?

A. Director of Athletics in the Athletic Department.

Q. How much is that?

A. $3100.00.

Q. Do you know what full professors and heads

of other departments in the University receive?

A. No sir, I do not.

Q. The football coach is the highest paid officer in our State University, is he not?

A. I don't know. I am not acquainted with the other salaries.

The State audit shows the coach's salary. The audit of the University would show the Professors' salaries I think.

The amount shown in the audit, as the coach's salary is $7632.50, it should be $7600.00. I don't know where the $32.50 comes from. I do not know whether there is any man on the Faculty of the University of Georgia, that receives a salary of that amount, I don't know about the other salaries.

BY THE COURT: How many other coaches are there?

A.Three of them.

Q. Do you know what their salaries are?

A. One gets $4200.00, and the next one $3,000.00. and the next one $2,400.00.

None of those were student coaches. I don't know exactly the total enrollment of the University of Georgia for 1934. I guess about 2400 students. The audit shows receipts from athletic fees of $23,214.29,

that would represent an enrollment of 2300 students or a little more. That includes men and women. The women are required to pay the $10.00 athletic fee. That in turn is turned over to the Athletic Association. The Athletic Association does not have any other income aside from the athletic fee and the receipts for admissions to games. That constitutes the entire income. The audit shows that for the year 1934, ending August 31, 1935, the Athletic Association received a total of $71,323.27 from football games. That would be correct. That is fairly representative of the amounts received from year to year from football games. That is about an average.

Q. So that the $71,000.00 added to the $23,000.00 student athletic fees would approximate $100,000.00 in receipts, which went into the funds of the athletic Association in the year 1934?

A. I don't know the audit by heart. It would be shown there.

Q. Does that seem to you to be about right?

A. That is a little larger than the average. I would guess that $77,000.00 is closer to the average from all sources from year to year. I know what the funds are expended for that come from those sources, other than payment of salary of the coach.

C. W. Jones is a trainer of football, and coach of swimming and boxing departments. He is the man testified to a moment ago as having a salary from the University. His salary is given as $2762.70.

BY THE COURT: Are their salaries fixed or are they a percentage of receipts?

A. No sir; fixed.

Q. Then how did he happen to get an odd 72 cents?

A. Salaries at one time were about 10%, which divided by 12 over monthly payments would make odd amounts.

G. W. Paulkman is an official who works in football games. He is not one of the students. He was paid $79.60. I would imagine that that is for acting as head linesman for the Georgia-Alabama game that year, that is one of the four officials engaged to handle that game.

We have the same official of the same type for each game you play. The audit shows an amount of $3150.00 paid to H. J. Stegeman, Director of Athletics. I am the one that receives that. That is the amount I receive from the Athletic Association. In the tabulated statement of receipts and disbursements listed under "Miscellaneous" is an item of "Students' room and board $8,057.45." I don't know what that was for. That is not an expenditure of the Athletic Association. It is a gift that the University makes to the general scholarship fund, which is disbursed to any student, who receives any benefit from the University. I would imagine there were at least 400 students in the fall of 1934 eligible for this.

Q. What would be the maximum amount that any one student would receive?

A. I think the maximum amount any student can receive on a loan is for the amount of his tuition, which is $120.00. The tuition for all students is the same. There were no gratuities made by the Athletic Association to any of the students. This $8,057.45 represents a sort of scholarship fund, which is made available to certain students. It represents the part that the Athletic Association gives to the General Scholarship Fund, which is administered by the University.

It does not represent the entire scholarship fund, that 400 students might be eligible for.

BY THE COURT: What proportion of that amount goes to football players?

A. I doubt if I could tell you.

Q. How many scholarships did you have on the football team?

A. I would guess, I would think, about 30; probably not that many on the football team; 30 in the entire department; or probably two dozen or more.

There is a record showing that. That is kept by the Faculty Committee, that awarded those scholarships. The University audit shows that. It shows what particular students got it and how much.

Q. The Athletic Association does not know who they were?

A. Yes.

Q. Let's have that information now.

A. We are not interested in who gets it. That is our share, that we pay into the General Scholarship Fund. That scholarship fund is handled by the Treasurer of the University.

Q. How does that scholarship contribution compare to the scholarships given to athletes?

A. That is the total amount given by the Athletic Association that year. I think there are enough athletes to consume that entire amount. The scholarships from the Athletic Association were given to athletes. The tuition is not the same for a student, who is a resident of the State of Georgia, as it is for a student from the outside, there is a non-resident fee.

A non-resident pays $100.00 additional; $220.00 plus his fees. If we had a member of the football squad, that came from outside the State of Georgia, his scholarship might or might not amount to $220.00.

Q. It would depend on the kind of deal you could make with him, when you induce him to come and play on your team?

A. No sir; I would not say that. Those matters are handled by a Faculty Committee. The Faculty Committee makes all awards made to any students during the year.

Q. Then, when you go out scouting for material for your football team for the current school year, you know, when you approach a student in another State, what inducement you can offer him to come in and play on your team?

A. I never do approach a student. They probably have scouts who do go out for prospective football material, but I don't do any of that myself.

Q. Who would have charge of making recommendations to the Faculty Committee with respect to the amount to be allowed in the way of a scholarship?

A. That is handled by the Faculty Committee themselves. No recommendations are made by coaches or others, with respect to those awards. Any member of the Faculty can make a recommendation as to who is to be put on that list, but the amount to be awarded to each student is governed by the amount available from any source. I am not able at this time to give you a list of the names of the members of the Varsity Squad in the Fall of 1934. Such a list is available. I think that can be produced, it is probably in our office in Athens. The easiest way to get it would be out of one of the football programs that year.

BY THE COURT: Do you recall approximately or definitely the members of the football squad in 1934, who held scholarships?

A. No sir; I do not.

Q. Can you name some of them that you happen to know personally?

A. I would have to get that from the office of the Treasurer of the University.

Q. You keep pretty closely in touch with the Athletic Association?

A. Yes sir.

Q. You keep pretty closely in touch with those on the football squad?

A. Yes sir.

Q. You know them pretty well?

A. Yes sir.

Q. Give those you remember.

MR. SMITH: If it pleases the Court, I will undertake to give counsel the full records for 1934. That is available. I will get the full records, his full records, each scholarship he handled. Prof. Payne of the University of Georgia has that, or I presume he has.

(Witness continuing) That is a tremendous list, because it includes hundreds and hundreds of students.

THE COURT: He said he recalled some. He might say those he recalls.

(Witness continuing) I know a boy named Joh Bond was one. He is from Toccoa, Georgia. Anothe was George Chapman from Winder, Georgia; don't recall the members of the team well enoug year by year to give you any more. I am quite sur these two played. These men had scholarships. The had been students at the University of Georgia fou years. This was their last year at school.

I do not have anything to do with the sale o tickets to football games. I do not have anything t do with the handling of the money, except the di bursements. All disbursements are made on m order.

Those disbursements, which are made on my orde are not made on checks, which I sign on bank de posits. They are made on requisitions given to ou Treasurer. The method, by which the payment o disbursement is made is that the Treasurer recei ing a requisition signed by me pays the amount fo whatever purpose is designated on the requisitio That is the Treasurer of the Athletic Associatio He has the custody of all funds derived from admi sions as well as athletic fees. Those funds are de posited in bank. They were kept separate from othe funds, from University funds, not mingled wit them in any way, they were kept separate in 193

There was a change made in the method of han ling those funds during the summer of 1936.

Prior to that time they were always kept separat

Q. Do you know anything about the amount tha

was collected on these tickets as federal tax, admissions tax?

A. I do not. I know how all of the total amount collected was handled.

MR. SMITH: The question is objectionable because it assumes it was collected as Federal tax. Can't we have a stipulation as to those tickets, and as to the stamp on the back of them?

MR. EUSTACE: The ticket will show for itself.

MR. SMITH: The tickets will show that all of them had that stamp on them, and we can decide whether it was collected as a tax or not.

I am the one, who had the say as to the disposal of all the funds, that belonged to the Athletic Association. I was the one, who handled it. I do not have final approval of it except in routine matters. All expenditures had to go through my hands. We have a stadium at the University of Georgia. Its seating capacity is 30,000. It was erected in 1927, 1928, and 1929. It was not built from surplus funds in the hands of the Athletic Association. The money was borrowed and is being repaid from proceeds of funds of the Athletic Association.

BY THE COURT: Was that fund borrowed from some private industry or individual or from a State fund?

A. It was borrowed from a bank.

The Athletic Association did not issue bonds or give its note to represent that loan. It had a group of alumni to endorse the notes up to a certain amount each, and the notes were signed by the Athletic Association, and endorsed by some private individuals. All of the money, that went into the construction of the stadium, was borrowed from that source. It was a loan of $180,000.00, I believe I am right. All of it has been repaid except I think about $28,000.00. That was within the period since 1929.

BY THE COURT: Is the stadium on property owned by the State of Georgia, or property owned by the Athletic Association?

A. The stadium is on property of the Regents of the University. They own it as Agents of the State. All property on the campus belongs to the Board of Regents. The loan was made but the property was not put up as security for the loan, it could not be.

I am not sure the title to the real estate is in the Board of Regents and not in the State of Georgia. It is either one or the other. It is not the Athletic Association. Whether the Regents or the State I don't know.

BY THE COURT: The stadium and the property on which it is located, belongs exclusively to the State of Georgia without any liens or outstanding encumbrances whatever?

A. Yes sir.

I might be mistaken as to that title being in the

State of Georgia itself, or the Regents. It is either one or the other.

Our business manager fixes the price, at which we sell football tickets to any particular game we play, in fact the Chairman, and myself. They are all members of the Board of Directors of the Athletic Association. During the summer the tickets are ordered about three months in advance, and prices are fixed in the early part of the summer, and prices approved by the Faculty Committee, and, when thus approved, our tickets are ordered. We have tickets all printed up for the whole year in advance. There are quite a number during the year of these social activities, that I mentioned as being put on by students, for which the Athletic Association furnished certain facilities.

Q. I believe you said a charge is made to students for attending those functions?

A. They probably do themselves. I referred to group dances, inter-fraternity dances, where an organization wishes to put on a social function. They stand all of the expenses of carrying on the function, that is, the music, and any refreshments that may be served. The Athletic Association does not put up any of the money for carrying on activities of that kind. If there is a surplus over and above the amount of the expenses of one of those dances, that belongs to the organization putting on the function. The only contribution made by the Athletic Association to a function of that nature is the use of equipment of building, and janitors. The Faculty Committee that

I have mentioned a number of times in my testimony, connected with the department of Athletics is composed of a group of members of the Faculty appointed by the President every year. They are not the same men, that constitute the Board of Directors of the Athletic Association. Usually nearly all of them are on the Board of Directors of the Athletic Association. There are about seven or eight on the Faculty Committee. Of that number probably one or two are not members of the Board of Directors of the Athletic Association. They are members of the Faculty Committee, and not members of the Board of Directors of the Athletic Association. They are all members of the Faculty. Only the Chairman receives any extra compensation by reason of serving on that Faculty Committee. He is a member of the Board of Directors of the Athletic Association.

I do not have personal charge of any of the records, from which the audit was made for the year ending August 31, 1935.

REDIRECT EXAMINATION, BY MR. KILPATRICK: The Treasurer of the University collected that ten dollars a year athletic fee which I referred to. Then that Treasurer turned it over to the Athletic Department.

RECROSS EXAMINATION, BY MR. EUSTACE:

When I spoke of the Athletic Department I meant the Athletic Association

CHARLES E. MARTIN, a witness called on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION, BY MR. KILPATRICK: My name is Charles E. Martin. I am employed by the Athletic Department of the University of Georgia at Athens. In 1934 and at the present time, I had charge of the collection of admissions to athletic contests. That card you show me is a football ticket. That is the same notice on the back of it with the exception of the name, that appeared on all tickets, admission tickets, sold by the University of Georgia in Athens in 1934.

This (Pltff's Ex. No.4) is a ticket of the Georgia School of Technology here in Atlanta. Ours was the same except the name, printed the same style except the name of the University of Georgia was used. That notice on the back of it was put on all tickets sold by the University of Georgia for 1934, at the direction of the Chairman of the Board of Regents, Mr. Marion Smith.

These funds from admissions at that time were kept mostly in the Trust Company of Georgia here in Atlanta. We kept part of them in the National Bank of Athens. Those accounts were kept in the name of the Athletic Department, perhaps the Athletic Association, too. There was a small revolving fund at the National Bank of Athens, that was kept in my name as Agent. There was another fund deposited in the Citizens and Southern National Bank at Athens in my name as Trustee.

BY THE COURT: Were all receipts for sale of these tickets you have described made and received by agents of the Athletic Association, agents or officers of the Athletic Association?

A. You mean were the deposits made?

Q. No; the actual sales of tickets. Were they made by people representing the Athletic Association appointed by you or acting for the Association?

A. I would say so. They were acting for the University or Board of Regents.

Q. Mr. Martin, were those accounts, which you have referred to, in the Trust Company of Georgia, and the Citizens and Southern National Bank of Athens, and the National Bank of Athens—were those the accounts, that these levies were served upon you with respect to?

A. One of them was.

Q. Which one?

A. In the Citizens and Southern National Bank.

CROSS EXAMINATION, BY MR. EUSTACE:

I have been connected with the Athletic Department since about 1921 or 1922. I am on the Board of Directors of the University of Georgia Athletic Association. I have been a member of the Board since 1929, I believe. I was a member of the Board in the Fall of 1934. Besides being a member of the

Board of Directors, I was Secretary and Treasurer in 1934. As Secretary and Treasurer, I had custody of all funds which came into the possession of the Athletic Association. Those funds consisted of proceeds of the students' athletic fees and the admissions to athletic activities. We had no income from any other source.

Q. This form of football ticket, which you have identified as being used at the University of Georgia in the Fall of 1934, appears to be one of those used by Georgia Tech. I have none of the tickets used over at the University of Georgia here. I have a ticket, general admission ticket, for one of our games last year. I don't have any for 1934. I probably have in my files, but not with me. I order the tickets printed at the University of Georgia. This notation appearing on the back of the ticket, which has been identified as "Plaintiff's Exhibit 4," was printed on the ticket at the University of Georgia for the year 1934. I don't recall now whether that was the first year that that statement was printed on a University of Georgia ticket. I would have to look it up. The face of the ticket used by the University of Georgia was substantially the same as the printing on the face of that ticket. This seems to be a seal typical of Georgia Tech. Sometimes we have carried a bull dog here. If this had been a Georgia game, it would probably have been University of Georgia game versus University of Alabama.

With respect to the selling price of the ticket, we also printed on the tickets used by the University of Georgia the admission price in one item and tax in

another item and the total, just the same as it is there. When these tickets were sold, these funds passed through the hands of others before they reached me as Secretary and Treasurer of the Association. Of course I cannot sell all the tickets over there. I have to have assistance, and these assistants would necessarily have to handle the tickets and also part of the funds. Those assistants were selected, usually, in conference of myself, Mr. Stegeman, and the Chairman of Athletics, and generally the Senior football Manager, who is a student.

Q. Then the men, who made the selection, did so with the approval of all the Board of Directors?

A. They were Faculty Members. When the game was over, and the proceeds were turned over to me as Secretary and Treasurer, I deposited them in the bank. I did not deposit all of the proceeds in one bank. I deposited most of them in two banks. We carried a checking account in one bank, and we carried another account, that took care of this amount, that was deducted from the total shown on that ticket. In other words, I mean the amount designated on the ticket as tax was kept separate from all the other moneys. That was put in a separate bank account, in the Citizens and Southern National Bank in Athens.

BY THE COURT: How was that account stated? How did it appear?

A. It appears we have two accounts there now.

Q. I am talking about the one with reference to

this tax.

A. That was carried in my name "Charles E. Martin as Trustee." The other account was carried in the name of the Athletic Association.

Q. Then by carrying this amount separate under your name as Trustee you were acting as Trustee for the Athletic Association?

A. Acting as Trustee for the University of Georgia or Board of Regents.

Q. Who designated you as Trustee?

A. I would not say that anyone did. I had authority to deposit the money.

I just voluntarily designated the account as "Charles E. Martin, Trustee." That represents part of the money I collected from the sale of tickets, and represents the amount, which is indicated by the word "Tax" appearing on the ticket. No part of the proceeds, or no part of the money in that bank account, has been used for any of the purposes of the Association. That has been kept intact all the time.

We keep a separate bank account for each year. We opened up one new account I believe. I don't know just what year that was. Those funds were carried as "Charles E. Martin, Trustee" through the 1934 season.

The account was originally opened May 8, 1934, which seems to have been the first deposit. So that

all of the money, that is in that account, is money that arose by reason of the amount designated as tax on the ticket. I had charge of the matter of making up the form of tickets.

Q. When you prepared the form for these tickets, you of course were aware of the provisions of the Federal Taxing Statute, which requires the collection of tax on admissions for certain activities, where admission was charged?

A. I knew a Bill had been passed.

I know the statute required the tickets to show the amount stated separately on the ticket.

Q. And because of your knowledge of the existence of that requirement this form of ticket was used?

A. Well, we felt we had to use that form—it is provided by law—because we didn't want to get into any criminal trouble about it.

I know an audit was made of receipts and disbursements by the State of Georgia of the affairs of the Athletic Association. I have seen a copy of it. I am not acquainted with that item in the audit of "Miscellaneous" expense — "Students' room and board $8,000.00."

Q. Just what are your duties in the Athletic Department of the University of Georgia?

A. I am Business Manager. I handle the details.

Q. Business Manager of the Athletic Association?

A. Yes sir. I am also Business Manager of the Alumni Society of the University. I am not a member of the Faculty of the University.

Under Disbursements the audit shows that Martin received $3,040.00. That represents salary I received. I did not receive any other salary from the Athletic Association. I did not receive any salary from the University of Georgia for 1934, except the salary I received as Business Manager of the Athletic Department. $3,040.00 represents the total compensation I received. That was paid through the medium of the University of Georgia Athletic Association. Out of proceeds of funds in my custody as Secretary and Treasurer of the Athletic Association, I issued the checks for all of the salaries.

DR. A. H. ARMSTRONG, a witness called on behalf of complainant, being first duly sworn, testified as follows:

DIRECT EXAMINATION, BY MR. KILPATRICK:

My name is Professor A. H. Armstrong. I am an employee of the Georgia School of Technology. I have been with that School twenty-three years. That is a branch of the University located at Atlanta, Georgia. In 1934, I was associate professor of History and Economics and Chairman of Athletics. The funds with which the Athletic Department of the Georgia School of Technology was run in 1934 came from gate receipts and student fees. The student fee

is one of the regular fees of the institution listed in the tuition bill. At that time the student fee was $7.50 per term. It is now $10.00. That fee was required of all students. It was called the student activity fee. The other proceeds came from athletic admissions. Those admissions covered various intercollegiate athletic fees, in which students representing the Georgia School of Technology participated.

Largely over a period of years we know about what expenses are, and what our reasonable income may be expected to be to meet these expenses. That has been usually the ultimate basis of admissions, that is how we fixed the admissions to those games. When I refer to expenses, I mean the entire expenses of maintaining an athletic department and staging the games. Enumerating some of the things for which those fees, those athletic admissions and student fees were used: They have been used for purchase of land, and for addition of fields, maintenance of various athletic fields, and used for supporting in part the hospital, and in part the doctor's salary. That is the school doctor; the doctor's salary, uniforms, helping the Band; any need that arose for these things.

The funds from which the salaries of instructors, coaches, came was from the general receipts. In 1934 the athletic part of the educational program at Tech consisted of a department, whose members were appointed by the President, and whose actual working staff were hired under the President.

Dr. M. L. Brittain is our President. Coach Alex-

ander of the Department of Physical Education, and the staff under him is in charge of the Athletic Department. Other than intercollegiate athletics we have the intramural program for everyone to take part in the physical education. We have physical classes for men who are not able to make the team or qualify for the military organization.

Q. Do you have any record of the approximate number of students, who engaged in intercollegiate athletics in 1934 at Tech?

A. Well, above 80%.

The receipts at any time from admissions and from this student general fee have never exceeded the expenses of that athletic program I have mentioned if you consider the purchase of additional fields. The University System of the State of Georgia has title to those fields. I think the correct name of that system is the Regents of the University System of Georgia. The athletic program at Tech has to be submitted for the approval of the Faculty. Our Athletic Department or Association was not incorporated at that time. There were rules in effect at that time, regulating the participation in intercollegiate athletics at Tech. All rules were published in the School Book of Regulations. This book (Plaintiff's Exhibit 5) is Book of Regulations for students, and all athletic regulations are in there. The Faculty of the Georgia School of Technology adopted that. This covered 1932. We had a similar booklet for 1934. There was no difference so far as athletics were concerned.

The number of athletic events and teams to which the student belonged, or in which he participated, is limited under these rules. There are rules as to scholarship requirements so far as students participating are concerned. There are requirements for students taking other forms of physical education who cannot compete in intercollegiate athletics. Each man has a corrective class for him. That is not required of students who engage in intercollegiate athletics. They have a certain time for corrective exercises. Coach Alexander appointed me to take care of it. The Georgia School of Technology has a bulletin published each year setting out the various activities at the School. The book which is handed me (Plaintiff's Exhibit 6) is the catalogue of the Georgia School of Technology for the year 1933-34. Page 171 and the following page set out the general athletic program and activities which I have mentioned.

The funds derived from the sources I have mentioned were used to pay salaries, buy equipment fields, pay the Bandmaster, the Doctor, and Hospital. These fees were not used for any other purpose than the ones I have mentioned. This covered the entire athletic program.

This card (Plaintiff's Exhibit 4) is a ticket for admission to the Alabama-Georgia Tech game November 17, 1934. That notice on the back of that ticket was put on all tickets of admission sold during that time at the direction of the Chairman of the Board of Regents of the University of Georgia, Mr. Marion Smith.

CROSS EXAMINATION, BY MR. EUSTACE:

The testimony, which I have just given, applies to the fall of 1934. During the period I have been testifying about we did not have an incorporated Athletic Association, to the best of my knowledge and belief.

After having examined that instrument (Defendant's Exhibit 2) I still want to say that the Georgia Tech Athletic Association was not in existence as a corporation in the fall of 1934. It was not incorporated.

I still want my answer to stand that Georgia Tech Athletic Association was not incorporated during the time I have been testifying about. I think that is correct.

Q. You did prior to the incorporation of this Association maintain at the Georgia Tech an unincorporated Association by the name of Georgia Tech Athletic Association?

A. We had a department called the Georgia Tech Athletic Association.

Q. You carried on business under the name of that unincorporated Association, so that, when you formed the corporation of the Georgia Tech Athletic Association, you merely adopted the name, and took over the equipment and the directors and the committees of the unincorporated Association?

A. Would you mind repeating that question?

Q. That was what was done when you incorporated, was it not? You just took over the unincorporated Association?

A. Yes.

In the Department of Athletics of Georgia Tech I testified that certain activities were carried on in the way of subjects in that department. Football is not a required subject for a degree for a student, who is enrolled in the department of Physical Education, so that a student who makes what I call the Varsity Team of Georgia Tech, and goes out and plays in those intercollegiate activities, is merely doing so voluntarily.

BY THE COURT: Does he get any credit for that on his class record?

A. No sir.

Around 50 students at the Georgia Tech during the fall of 1934 were members of the Varsity Squad. Those were the ones who played at the games for which admissions were charged. I think the total enrollment in the School in the fall of 1934 was about 2,000. Of the 50 students on the Varsity Squad some came from departments other than the Department of Physical Education, from anyone registered at the School eligible to participate.

Q. How many of that 50 on the Varsity Squad

were students enrolled in the department of Physical Education?

A. I think that it ought to be made clear that we do not have a department of Physical Education, in which a degree is granted. If that is the purpose of your questions, we could not say they were in that department. We do not maintain such a department. We are not allowed to do it legally.

The activities, athletic activities, carried on were more for the physical training of students than for developing them into teachers to go out and teach athletics. I do not recall what the total receipts were from athletic admissions during the year 1934 and 1935. I think the total was around $94,000.00. I am not sure about it. There is an audit made for every year. I have that audit with me. I believe it is in my file. I have presented you what purports to be an audit of Georgia Tech Athletic Association for the six months ended December 31, 1934, prepared by Haskins & Sells (Defendant's Exhibit 1) that purports to give a statement of the receipts and disbursements during the period, six months period covered. The accounts of the Georgia Tech Athletic Association are carried on a calendar year basis. The audits were made for six months periods.

BY THE COURT: Is that the whole School of Technology or the Athletic Association?

A. The Athletic Association only.

The audit for the period ending December 31, 1934,

purports to give receipts from the sale of football tickets of $74,168.51. That is the amount as I recall it. And the total receipts for the period of $119,436.75 is for only the six months period ending December 31st. Other athletic activities carried on, to which admissions were charged, during the school year aside from football games were basketball and baseball. No charges were made for track exhibitions that year, so far as I recall. It was football, baseball, and basketball, and during that year there were collected from the students the athletic fees, $7.50 from each student. That was paid by each student who was enrolled in Georgia Tech. The purser of the Georgia School of Technology received the proceeds of those athletic fees. Part of those receipts were turned over to the Athletic Association. All of it for the fall of 1934 that amounted to about $11,000.00, or $12,000.00. In return for payment of that athletic fee, the student received all the privileges and facilities maintained by the Athletic Association, tennis courts, use of gymnasium, use of athletic fields, and so forth. That included the privilege of attending games.

Students were not required to purchase tickets to attend football games or baseball games. The activities during 1934 and 1935, for which an admission price was made, were just football, basketball and baseball. About fifty games altogether were played in all of those three activities. With the $7.50 athletic fee we were allotted as the price of a season ticket for all of those games they got in pretty cheap. Those receipts of $74,168.51 from football shown in

the audit for the fall of 1934 compare favorably with receipts for other years. It was less than 1928 and 1929. I estimate the total income of the Georgia Tech Athletic Association was from athletic activities during the year 1934-35 to be approximately $123,000.00 or $124,000.00. This audit shows that we had an excess in income of $33,521.77 during that six months period. That excess was used to pay outstanding bills and notes due on acquisition of property. When I refer to notes due on acquisition of property I mean notes given for the purchase of a playing field. That is what I designate as the Rose Bowl.

BY THE COURT: In whose name was that taken?

A. Regents of the University of Georgia.

Q. You have a stadium at Georgia Tech?

A. Yes.

Q. What is its seating capacity?

A. 29,000.

The stadium at Georgia Tech was constructed over a period of years, that is, one stand, the west stand, was built in 1914; then another stand, the east stand, was built in 1916; it was constructed over the years as the need arose. The last addition was made in 1925 or 1926. The total cost of the stadium as it now stands is approximately $275,000.00. The stadium is used for all of the functions of the school, football

games. It used to be used for baseball games, track, military reviews, and all student activities, that required an open space. That applies to Rose Bowl field. This stadium is the place where the intercollegiate football games are held. It is used principally for that purpose. The building of the stadium was financed by a gift of $50,000.00 by Mr. John W. Grant, for whom Grant Feld was named, and returns from the funds received from gate receipts, including fees. Rose Bowl Field was financed by $50,000.00 received from the Rose Bowl game in 1929, and is still being paid for out of gate receipts. Any surplus funds received from admissions to athletic activities are applied towards the reduction of the indebtedness against the stadium on the athletic field and maintenance.

Defendant's Exhibit 3 is a Report on Examination of Accounts for six months ending December 31, 1934, of the Georgia Tech Athletic Association. That report was prepared by Haskins & Sells, Certified Public Accountants, of Atlanta and of the United States. A similar examination and report was made for the following current six months' period by Haskins & Sells. I do not have a copy of that report. Directing my attention to page marked "Exhibit A" in that report, and particularly to the items including receipts, I find on that page the amount of receipts from football games for the fall of 1934. The amount shown is a total of $118,966.80. On the same page under the item of "Expenses" there appears "Football $59,648.34." Into that item goes salaries; purchase of equipment; guarantees to other schools.

mean salaries of the entire staff, coaching staff. We have eight on the coaching staff at Georgia Tech. W. A. Alexander is the Head Coach. He receives a salary of $6,000.00 per year. That is his total compensation for his connection with the Athletic Association. He receives no compensation from the School itself.

The salaries of assistant coaches run from $3300.00 for Back Field Coach; Line Coach $1800.00; Basketball Coach $1200.00; Freshman Coach $1500.00; Assistant Freshman Coach $500.00; Track Coach $1,000.00.

We have no trainers. We had one trainer in 1934. His salary was $150.00 per month.

On the following page designated as "Exhibit C," statement cash receipts and disbursements, there appears an item of $2571.70 designated as personnel expenses of a Tech emergency loan fund.

That is a contribution from the Athletic Association to the General Fund of the School. The University System has never provided funds to pay a personnel officer, and the Athletic Association took over the salary of that officer, the Assistant Dean of Men.

That is included in that fund.

That is the main purpose of the use of that fund.

Loans to students are made from the General Scholarship Loan Fund.

Those students, to whom loans were made, may o
may not be members of the Varsity Team.

They are sometimes made to students, who play o
the football team.

BY THE COURT: What is the amount of tha
particular fund you are talking about now, tha
provides for scholarships?

A. $2571.70.

As to whether scholarships are allowed or paid t
students other than football players out of contri
butions to this fund by the Athletic Association,
would like to make clear, sir, that that is not th
entire scholarship fund. That includes the salary o
the Assistant Dean of Men at the Georgia School o
Technology.

Q. Have you a scholarship fund for football play
ers?

A. A general scholarship fund.

As to how that fund is raised, the School has cer
tain scholarship funds, which are available, and th
Athletic Association has contributed to that genera
scholarship fund.

It contributed in 1934 around $7500.00.

I am sure that part of that fund was used fo
scholarships to others than those who played foot
ball. As to any exceptions, individual names, I woul

have to get the Assistant Dean's list to tell you that.

The Assistant Dean of Men would know definitely what amount of that fund went to football players. Mr. George Griffin is Dean of Men. Coach Alexander would know that. A boy might come in, and might need a suit of clothes; any student might need a suit of clothes; or his parents might die, and he might need to go home immediately; and he might need a loan, which will carry him for 30 days. In either case he would apply for this loan, and that loan would be granted. A great deal of that is paid back. It serves any purpose at all that in the opinion of the Assistant Dean of Men was a real need.

As to whether the funds for scholarships to football players were in the nature of gift or loans, in 1934 they were listed in the nature of loans, for which they signed notes.

As to whether those notes were carried as assets of the Association, and listed in the audit, they were carried as assets of the School.

This particular $7,500.00 is in the school. We have nothing to do with that.

No contingencies or conditions are placed upon that contribution from the Athletic Association as to who shall get those scholarships. It is in the jurisdiction of Dr. Brittain and the Assistant Dean of Men, and according to recommendations made to him.

As to what proportion of that $7,500.00 actually went in 1934 to scholarships for football players, I am not in position to answer that except as a matter of belief. I should say possibly around two-thirds or less.

As to what, if anything, is done by either the Athletic Association or the School in finding material for football teams, at Tech we have men who are interested—Coach Alexander and his assistants are interested—in High School players as they come up during the years. Those men, who were old players, are interested. We get our leads on the good men in that direction. One of our old players might see a good boy in Alabama, Arkansas, or North Carolina, or some alumnus might see a good boy among the players, and they are contacted, and, if he is interested, we would be glad to have him.

As to what we do, if anything at all, in the way of sending out scouts for additional materials, I would not state that we send out scouts to find material. As I have said, alumni members and ex-members of the institution will write Coach Alexander, or one of the members of the Coaching staff, and they would say that there is a good man at Americus or Columbus, and usually this alumnus would say to this man "Suppose you write to Coach Alexander." All those letters are turned over to Mr. George Griffin, and he will tell the boys on what conditions they may receive help, or whether they have the required entrance units, and find out whether they are interested in the kind of education we give, which is lim-

ited, and then the boy may come up or he may go somewhere else.

As to whether inducements are held out to these men, who we think would be star football players, to induce them to come to Georgia Tech, and play on the football team;

The General plan of Tech is to find out from whatever sources we can what the condition is. Usually that is covered in a Questionnaire, which is sent to him: "Are you interested? Are conditions such that you need scholarship aid? What does your father do? How much does he earn? What property has he? What is his general financial condition?" Then the blank will indicate if his people are actually in need, or what part, if any, they can contribute towards his expenses. That blank is also filled out by the parents. If the boy says or his parents say that they can supply his tuition, but cannot supply his board, he will be made a loan for his board, or whatever his need is, and that applies to every student. Naturally coaches are interested.

Take for instance a man from Alabama or North Carolina or New Jersey, or some other point, a Georgia boy and a New Jersey boy are exactly on the same basis.

As to what those scholarships consist of; a boy receives no money at all of course. He may receive his board; may receive his room rent; may receive both; may receive his tuition; or all three.

As to the total maximum a player might receive; the total expense of a within-State student at Tech would run between $500.00 and $600.00 for the year.

BY THE COURT: Is any such elaborate and careful effort made to ascertain the availability of students particularly qualified along intellectual lines in history or engineering or surveying or the like? Have you any elaborate system like that in awarding scholarships to worthy men, who have attained some prominence in an intellectual way?

A. The same attention is paid to those men. They all go through a similar course.

Q. I am speaking of the effort to locate them, writing to their parents, where the institution takes the initiative itself.

A. That is done through the Registrar's office and the Principals of High Schools.

Q. You don't make any particular effort to find those?

A. No; I would say not. May I say a word, your Honor? If a Principal is as much interested in his Honor students as a coach is interested in his High School Honor students as a coach is interested in the football squad, he can get the same attention as a boy that is playing football.

Q. As a matter of actual practice and experience that is not done?

A. I am afraid the Principals do not take the same interest, your Honor.

Q. So as far as these scholarships are concerned, the chief activity and interest towards developing the educational qualifications of a boy are those educational qualifications which are strictly physical and which come within your Public Health Department?

A. No sir; that would not be true, your Honor. The Georgia School of Technology will have 18 or 20 applications for getting help from students who might play football, when there would probably be 275 ordinary students that get help.

Q. I am talking about the initiative, going out and trying to find these exceptional students. There are exceptional students with intellectual capacity out of the ordinary as well as students of physical prowess out of the ordinary. As I understand it, all of the effort is made towards those who have physical prowess?

A. That is true of the Physical Educational Department. It would not be true of the Registrar's office.

Q. Doctor, these questions of the Court are directed towards the proposition of whether or not this is a business institution, whereby the College is using it for the purpose of advertising or for commercial gain. That is the distinction that is undertaken to be made by the Government in this case.

With that explanation before you, is there any other department in the College whereby an elaborate separate and distinct business organization or arrangement is made for carrying on that department of the work?

A. Yes. We have at least three other departments, which handled all student activities, both spiritual and social, and I think all of the extra-curricula activities are handled by their own departments.

Q. Take the department of History. Have they a separate business manager, coach, and do they keep a separate set of books, and do they have people who are employed to coach and train up special students, and do they have special ones to go out and find these students?

A. No sir.

Q. Take the Engineering department. Of course every department has its budget under the Regents' System.

Q. I am speaking now about a separate business organization.

A. No sir. There is no other department in the College, that that applies to other than the Social; that is not a strictly educational department.

The total receipts from football appeared to be in excess of $127,000.00 for the fall of 1934. That is comparable to the receipts from year to year from

that source, except boom years, 1928 and 1929, the periods of our highest receipts. Our receipts were increased a great deal by the Rose Bowl game in California in 1929.

In that year the School had an excellent team. The total receipts from football that year to my best recollection were about $200,000.00.

The surplus funds over and above the actual expenses incurred in carrying on the athletic activities are used for any need that the School develops. It has been the practice, if a need develops in any department and it comes to the attention of the President, the President will suggest to the Athletic Association that it can come to their help, and that suggestion is, you might say, practically mandatory.

Particular advances I recall that have been made to the School out of surplus funds of the Athletic Association were, as I testified yesterday, I believe, that we paid the Bandmaster's salary, bought uniforms for the Band, and bought equipment for the Hospital. We have paid the Assistant Dean of Men's salary, half of his salary; we paid the Doctor's, half of the Doctor's salary; and then we contributed from the athletic funds to the completion of the dining hall. Enough funds were not appropriated to complete it, and we contributed $20,000.00 to complete that.

It was stated in the form of a loan for bookkeeping purposes on the Athletic Association's books.

It is carried in the audits as an asset of the Association.

Receipts from these athletic activities come in immediately after the game, and come to my office. Those receipts are checked, receipts of each seller, against his invoices. The money is placed in the safe, recounted, and deposited in designated banks on the following morning.

The funds of the Georgia Tech Athletic Association in 1934 were carried in the First National Bank of Atlanta. Under instructions of the Chairman of the Board of Regents we placed the general operating funds in one account, and placed funds which were under dispute in another savings account. By "funds under dispute," I mean funds that come up as part of the gate receipts, as stated on that ticket, the part for the tax.

My office had charge of the preparation of the tickets for the football games. "Plaintiff's Exhibit 4" is one of the tickets that was used by the Athletic Association in the fall of 1934.

Referring particularly now to the item of the sale price of the ticket, there appears to be a designation of the established price $1.36, and tax 14 cents; total $1.50, that scheme was carried out on all of the tickets that were sold.

This item indicated on the ticket as "tax"—the total of those receipts were kept in a separate account, deposited in a savings account. No other funds

of the Association or the School were placed in that account in bank. The only funds in that bank account were the proceeds from the amounts designated as "tax" on the ticket. There was no commingling with any other funds at all.

I have the form of checks that were used.

MR. SMITH: I am not making objection to that designated as "tax" by the ticket, but I am not foreclosing the argument with regard to the stamp on the ticket. He said "designated as tax," but we make the point that it is not a tax.

Defendant's Exhibit 4 is one of the form of checks used by the Georgia Tech Athletic Association in disbursement of its funds. That is representative of the form of all the checks used in the Fall of 1934 by the Georgia Tech Athletic Association. I have the checks that were used for the payment of the admissions tax for 1932.

Defendant's Exhibits 5-A, 5-B and 5-C were for amounts that were paid to the Collector of Internal Revenue, representing payments of admissions tax on admissions to games in the Fall of 1932.

REDIRECT EXAMINATION, BY MR. KILPATRICK:

As to whether there is any other educational program at Tech besides the physical education program, there is a general religious program.

The Secretary of the Y. M. C. A. and the Dean of

217

Men have charge of that.

A student does not get credit for that.

As to other educational activities along similar lines, there is the Glee Club.

The student does not get credit for that.

The Y. M. C. A. had its own Bookkeeping Department.

Other activities were student dramatics, and others of that kind, which were indirectly under the supervision of Dr. Brittain; directly under the Dean of Men.

BY THE COURT: Do any of the funds from any of those agencies go into the funds of the College?

A. No. They are handled as the Athletic funds.

I testified that Grant Field football stadium had been used primarily for athletics. It has been used for public events in the city, such as Oratoriums, or song festivals they have had there. They have had military parades there. The President of the United States spoke there. Lindbergh was received there. It is the only drill ground supplied by the State for the Naval and Military units there.

This physical educational program, which comprises intercollegiate and intramural activities would be absolutely impossible without these admissions

and fees from these students.

Q. Now, Prof. Armstrong, opposing counsel has questioned you with respect to the incorporation of the Athletic Department or Association. Has that charter ever been accepted?

MR. EUSTACE: That is objected to as not the best evidence, and as calling for a conclusion of the witness, who is not shown to be qualified to answer.

THE COURT: The objection is overruled.

MR. EUSTACE: Will your Honor allow us an exception?

THE COURT: Exception noted and allowed.

A. The organization was never consummated.

I was one of the incorporators named in that Petition. The incorporators had a meeting to accept the charter.

There is a head of each department at Tech, Mathematics, Engineering, and Athletics.

Coach Alexander is Physical Director at the head of the Athletic Department.

The Faculty and Dr. Brittain have control of all that entire system of education.

They account to the Board of Regents.

BY THE COURT: Who fixes the salaries of those employed by the Athletic Association? Are they fixed by the Athletic Association or the President?

A. The President. Recommendations are made to him.

The account or accounts, to which I have referred as having been 10% of the money collected from admissions—is the account levied on by Mr. Page.

RECROSS EXAMINATION, BY MR. EUSTACE:

The Y. M. C. A. organization does not engage in any activity from which it derives a substantial income. The Glee Club from its funds has derived some income.

It is not anywhere comparable to the income received from football games. It is a very small amount as compared to receipts from football games.

The Dramatic Association is not engaged in any activity which brings in a substantial income.

Not comparable to the income from football. Those organizations just about break even. They have receipts from entertainments they put on.

Any surplus funds that may be used varies with the years;

But it is nothing comparable to the amount from football.

With respect to the use of the stadium on the athletic field for public occasions, in some cases admissions are charged.

When the President of the United States appeared and made an address, no admissions were charged. They wanted to, but they did not.

There were no admissions charged in cases, when we may have had military parades there.

Public occasions held on the athletic field, that I can recall, for which a charge was made were a series of concerts that were given there by a public city organization, and then there is a charge where the field is loaned to High Schools or any other organizations.

The Athletic Association has never received any part of the receipts.

It is merely a matter of courtesy in extending the use of the stadium to the other organizations.

And the other organizations receive the benefit of any income that might be derived from such admissions except in the case of High School games.

The Athletic Association receives a small share of the proceeds of athletic games put on by High Schools.

That would amount to, I think, somewhere between 8 and 12 per cent; merely the expense of lighting the field and things of that kind.

I don't recall whether there were any charges of that kind made, or any receipts of that kind received, in the Fall of 1934 by the Athletic Association. I would have to look it up.

We had a baseball team in 1934.

We charged admission for those games.

With respect to baseball games being self-supporting in 1934, they might have just broken even.

We did not have a baseball team at Tech School in 1935, we didn't have hard ball, we had plenty of soft ball.

As to the purpose in giving up the baseball activities in 1935, college baseball has fallen out. We substituted soft ball because instead of having two teams playing hard ball we could have 30 to 50 teams playing soft ball.

I think probably there is just as much physical benefit from playing baseball as football.

As to the purpose of abandoning the baseball activities, any sport, that we maintain, where the students lost interest in that sport, we can substitute something for it. We make a change. We did it with LaCrosse at one time, and some others. There is no student interest in college baseball.

There is no public interest whatever in college baseball.

With respect to the matter of incorporation of the Athletic Association, and what I understand that it takes to form a corporation under the laws of Georgia, I was told that we had to make this application. We made the application, and then it just hung fire because the application was made with definite instructions for a particular purpose, and that purpose hung fire for a long time, and we just didn't consummate it. We never held the organization meeting.

My testimony then as to whether or not this organization was incorporated during the period in question is based upon my conception of what it takes to form a corporation under the laws of Georgia.

Q. Now with respect to the individuals, who make up the incorporators of the Athletic Association, are they the same individuals?

MR. SMITH: I know the facts myself. A charter was obtained as of the date, which appears on it. The first meeting of incorporators organized under it occurrred as of a date after 1934. Those are the facts, and what conclusion we draw from that we don't need to ask the witness.

MR. EUSTACE: Just one more question, unless you want to stipulate that the individual incorporators of Georgia Tech Athletic Association were the same people, who immediately prior to the application for charter served in the same capacity in the unincorporated Association bearing the same name.

MR. SMITH: Whatever the facts are we still stipulate.

Q. Is that true, Mr. Witness? Were they the same people?

A. They were.

DR. M. L. BRITTAIN, a witness called on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION, BY MR. KILPATRICK:

My name is M. L. Brittain. My office at the School of Technology is President. That is in Atlanta, Georgia. I have been President of that School for fourteen years. With respect to the educational program in its entirety that is carried on at the School of Technology and that was carried on in 1934, we are primarily an engineering institution for teaching engineering and architecture, and, of course, we try to carry on a rounded educational system, not only to reach those branches, but also through the Y. M. C. A. we try to reach the boy in what you might term his spiritual nature, and in the Athletic Department his physical education. The Faculty had charge of our entire educational program at Tech. W. A. Alexander was the head of the Physical Athletic Department. The system of athletics, or the program of athletics, that was carried on in 1934 was adopted by the Board called our Athletic Board at the Georgia School of Technology. I am head of that Board. The Board is composed of the President, seven Faculty members, three ex-officio students, and three alumni members. In 1934, I accounted to the Board

of Regents for that program for their approval or disapproval, just as all the other departments. It was approved.

CROSS EXAMINATION, BY MR. EUSTACE:

We do not have separate boards at the head of other departments of the School aside from athletics.

Q. The Athletic Department is the only one, in which a separate Board is maintained?

A. I hesitated to answer that because we have in effect something like Boards. In our Engineering Experiment Station and in diverse other ways besides we have something nearly like that, but not exactly by that term, no sir. Will you let me explain that a little?

We have a Military Department in the School.

We do not have a separate Board at the head of that department.

In our School Engineering, for instance, we do not have a separate Board at the head of the Engineering Department. That composes nine-tenths of the School.

That is really the largest department in the School.

With respect to athletic activities, that are carried on by this Board, that is the Board known as the Georgia Tech Athletic Association.

That Board has been designated by that name since before my day, sir. It was there, when I became connected with the School, and had been for many years. I cannot tell you the number.

Q. The sole function of that Board is to have charge of or direction of athletic activities in the School?

A. That Board knows that it is amenable to the General Faculty always, and we frequently do criticize them, or handle them, you might say, without gloves.

Q. But the function of the Board is to direct the athletic activities?

A. That's right, sir.

Q. Is there any other department in the School aside from the Athletic Department, which makes a charge for exhibitions, that are put on by students in those departments?

A. Yes, sir; our Dramatic Club mainly does, our Dramatic Club for public speaking and dramatics I should say.

We do not have a Board at the head of the Dramatic Club.

That is purely a student activity, with always a Faculty advisory member.

Now with respect to the activities of the Athletic

Board, they keep their own accounts and handle their own funds, and keep them in separate bank accounts in bank, and disburse them with their own checks.

Q. What requirements are made of students in the Georgia School of Technology with respect to athletic activities?

A. Won't you kindly be a little more specific? In what way, sir?

Q. As to their rank in their studies.

A. It is precisely the same for all the students. They must keep up exactly the same as a student in Electrical Engineering or Textile Engineering or anything else.

As to what part in the athletic activities they are given credit towards a degree, we don't have a degree for athletics.

There is no recognition given towards a degree for graduation in engineering for the time put in athletic activities. None whatever.

REDIRECT EXAMINATION, BY MR. KILPATRICK:

No credit is given towards a degree for participation in the religious activities of the Y.M.C.A. nor in the general debating club. There is, however, a Department of Public Speaking in our English

course for which credit is given. No credit is given for a performance of the Glee Club, and no credit is given for participating in putting out a student publication.

DR. S. V. SANFORD, a witness called on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION, BY MR. SMITH:

My name is Dr. S. V. Sanford. I have been in educational work forty-five years. I have been connected with the University of Georgia since 1903. I went to the University first as an instructor in the English Department; then a Professor; then I organized one of the schools of the University; then made a Director; then Dean of the University; then President; and now Chancellor of the University System of Georgia. Until the reorganization Act of 1931, the Chancellor was an officer only of the University in Athens. Prior to that time there was no such position as President of the University in Athens. That was made an office when the Chancellor was transferred to the whole system. Colonel Snelling was Chancellor of the University for some years before that. I was the first President of the University of Georgia. I was Director of Athletics beginning in 1908 and remained so until I became President of the University.

I want to clear up one thing, that came up yesterday. Mr. Stegeman referred to a committee for passing on scholarships, that committee was created in

1935 to function in the College year 1936.

As to who supervised the grant of scholarships before that time, the method used at the University was that the Registrar of the University sent to an officer known as the Director of Personnel, and, if that record was good, then he sent a Questionnaire to find out whether or not this or that person was financially able to enter the University without help. This list was submitted to me as President, and I okayed it.

The Athletic Association as such has never been permitted to grant scholarships.

It has never done so to my knowledge.

The granting of scholarships has been under my supervision.

The audit shows that a contribution was made to the general scholarship fund in 1934. I would like to make that clear. No student can register in the University without the payment of all fees. We have a number of students, that are appointed to scholarships by outstanding organizations like the Bankers' Association and so forth, and a letter from that organization is authority to register the student. Now we allot funds to athletics and other organizations, and, if the student owes anything to the University, then the collateral is there to take it up.

Before we leave this,—I have made investigation to see how many students are receiving scholarship aid. My last year the number exceeded 900.

I never checked carefully in my last year there to see how many of them were connected with the football team or squad, but I would say between 20 and 30. You were speaking of contribution to other extra-curricular work. These of the University would be divided into three main units—intellectual, moral, and physical development. Allocations have been made to the Demosthenian Literary Society and the Phi Kappa Literary Society. They are the oldest literary societies in the United States.

They meet on Wednesday nights, and engage in debate and public speaking.

It is an educational function, one of the finest we have in the institution.

Credit is not given towards a degree for that work.

I said we allocated funds to it. We allocate funds to maintain, to help maintain, the Glee Club, the Economics Society, the Pioneer Club, which is a club of women, the Band, and a large sum of money to maintain what is known as the Students Voluntary Religious Association.

All of these functions—are under the control and direction of the President and Faculty of the institution.

It is regarded as part of the educational program.

No credit is given for that or for the editing of the various papers. I am not positive about some

edit being given on the degree of Fine Arts for ecomplishment in the Band. They have been dis-ussing that for some time, and I don't know what nclusion was reached.

As to whether they produce revenue of their own, here they charge the public, the Glee Club charges dmission and makes money. The $400.00 or $600.00 lotted to them from time to time, or whatever is eeded for the Glee Club to make its trip, is the only uarantee they have. The other must be made from ie receipts.

BY THE COURT: In these allocations you speak , would any part allocated for the general ex-enses of a society be for the particular purpose of holarship for any person excelling in that particu-r activity?

A. Well, it would be difficult to answer that. We tempt to do everything we can to attract good de-aters to the University because we have so many tercollegiate debates with institutions in the East. 'e have in Georgia what is known as a State High chool Association, and it has contests, consisting of hletics and debates largely, and we ask each Dis-ict to hold a meeting, and stage these contests, and ie winners are sent to the University; that is, the inners are selected; and we keep our eye on the ery best people, who can suggest to the winners iat we would like to have them at the University.

As to what extent I keep in touch with the High chool Superintendents of the State about boys in-

tellectually prominent, who need help to go to the University, I suppose every mail brings a letter from a Principal or Superintendent, stating that "this is an outstanding boy in debate, or in music, or in athletics (As the case may be), whose parents are poor. Is there any possible way to aid him"? If possible, we aid him..

Q. Now I want to ask you about the process—I am asking you this as Chancellor of the System—by which the Board of Regents approves the programs of these institutions, including their athletic programs? To what committee of the Board of Regents is it reported?

A. The Chancellor makes reports to the Finance Committee, and the Finance Committee makes its report in turn on this. On educational matters the Chairman of the Educational Committee. They make their reports.

These Committees don't keep minutes, they only make written reports.

That does not show the detail of what they have approved.

BY THE COURT: Have you a College baseball team?

A. Yes.

Q. Does it pay for itself A. No.

Q. Do you have intercollegiate track? A. Yes.

Q. Does it pay for itself? A. No.

All of these intercollegiate sports that we maintain do not pay for themselves, only ofotball. That s the present public taste.

I can remember the time when football didn't support itself, and baseball paid the best of all sports arried on, all form of athletics. It is only since the Vorld War, when people became interested in bodily ontact sports, that it has been, that is football, on a aying basis.

I regret to say we could not maintain the physical ducation we have in athletics without charging for ootball games.

CROSS EXAMINATION, BY MR. EUSTICE:

With respect to the allocations, that are made to he Dramatic Society, for instance, that money omes from the general fund of the institution.

Q. From appropriations made by the Legislature f Georgia? A Probably I could answer this ques-ion this way. The budget of each institution is made p of three items—the amounts allocated from State ppropriation; the amounts paid by students; and he profits made from the dining hall and dormitory. 'hat constitutes the budget of each unit of the University System. It is an anticipated income of course.

Q. The general fund, from which these funds are llocated, includes money received from the appro-

priations of the Legislature? A. From the combined sources.

Q. So that any allocation, that might be made to any of these independent activities, might have come from the taxpayers of Georgia. A. No sir.

Q. How do you emplain that? A. Originally the Catalogue of the institution stated the fees of $120.00, and then specified that ten dollars was for athletics, five dollars for the library, and five dollars for the hospital, or this or that as the case may be. The actual tuition of the students, if we may call it tuition, was $100.00, and this $20.00 was a student activities' fund, and it came from the students. I wish to amend that by stating that, when the Board of Regents took charge, I recommended that they fix a uniform tuition fee for all the institutions. So they fixed $122.50 for Georgia Tech and the University and $54.00 for this and that, that you are not interested in. That left some discretion for the first time in the hands of the President, who could allocate a certain amount to athletics, a certain amount to the Glee Club, and religious welfare and so forth.

If we needed money to pay the faculty, we made the allocations smaller.

The allocations that I have been testifying about, come from the general funds of the University, and the appropriations from the Legislature go into the general funds.

We have also the student fees, tuition fees, that

I have mentioned, and they also go into the general fund, and they are all mixed up together.

Q. So that it is impossible, when an allocation is made, and paid out of the general fund, to specifically separate the amount, that might have been derived from the appropriation of the Legislature, and the amount, that might have been derived from tuition fees? A. No. We know that we cannot exceed the $20.00.

I presume that it is true that it is more a matter of computation than an adjudication or separation of the funds.

With respect to the literary societies and the Glee Club, as to whether either one of those organizations contributes any of the proceeds of its entertainments to the School, all activities are supervised, and all fees are paid into the treasury of the University.

The Literary Society does not handle its own funds, it has no funds other than those the President allocates.

If they should put on an exhibition, dramatics for instance, and charge admission, the proceeds of those admissions all would be turned in to the treasury of the University.

We would have to take something else than the Literary Society because the Literary Society never

puts on these exhibitions. We would have to take the Glee Club or the Dramatic Club.

Take the Dramatic Cl[illegible]or instance; they put on an exhibition; and charge admission; they would have some expense in putting on an entertainment of that character.

I believe that would be taken out of the proceeds and paid before the accounting was made with the school for the balance, so that, if there is any surplus remaining, it goes into the School fund.

As to the approximate amount of profit, that might be derived from one of those dramatic exhibitions, they maintain themselves, all of these, to the best of their ability. If they were entirely self-supporting, there would be no allocations.

I am President of the Athletic Association of the University of Georgia. President of the Board. As President, I am familiar with and in touch with all of the activities of the Association.

This (Defendant's Exhibit 6-A)was a form of ticket used by the Columbus Group. This is an admission ticket to the game between Georgia and Auburn under the auspices of the Athletic Association of Georgia, Auburn, and Columbus.

I imagine this is substantially the form, that was used for admissions to other football games.

I imagine the other ticket (Defendant's Exhibit

6-B) is also one of the tickets, that was used at a football game held in the fall of 1934. I was not present at either one of the games.

I imagine that is the ticket used at one of those games. I was not present.

Q. You are President of the Athletic Association, and know what they are doing? A. I do not know such details as those.

I would be able to identify that as one of the tickets used by the Athletic Association for a football game in the fall of 1934.

Q. Now with respect to scholarships you mentioned in the early part of your testimony, I will ask you to state, Doctor, what, if any, inducements are held out to men to play football at the University of Georgia. A. Well, no inducements are offered except that some are awarded scholarships, if you wish to call it such, from the loan fund just as other students at the institution.

I know something of the names of the personnel of the Varsity Team in the fall of 1934.

We had a man named Maurice Green.

He was from the West.

From outside of the State of Georgia.

I am not able to state how he happened to become a student at the University of Georgia.

I cannot say what course he was taking at the University. I cannot tell what course this student or that student out of three thousand was taking without the aid of the Catalogue, which would register what course he was taking.

He had a scholarship.

As to the amount of the scholarship, I think that no student received any aid other than Board and lodging. No tuition.

Tuition cannot be waived for any student.

Where a student comes into the University, and does not personally pay his tuition, if I understand that statement, all students pay tuition, and, if a student is granted a length of time, in which to pay that, that permission is granted by a request from him to the Treasurer.

Certain scholarships granted to the students include the tuition.

And if a student should come into the School from outside of the State, and he was granted a scholarship, that scholarship, so far as tuition was concerned, would amount to the regular student's tuition plus the amount chargeable to students from outside of the State.

That would be One Hundred Dollars extra, or $222.50.

Where a scholarship would include board, that

would amount to, we would say $20.00 a month probably.

It is a nine months' school.

And that would average $20.00 a month.

If there was any man on the football squad, who was an outstanding football player, he attracted particular attention of the public.

This man Green, that you were asking me about, was an excellent full-back.

Naturally the members of the Faculty and the public would know something about him, and pay particular attention to his playing by reason of that fact.

As to what this man Green had in the way of a scholarship at the University of Georgia, perhaps he had a scholarship that paid his tuition and board and lodging.

As to whether other inducements outside of those scholarships sometimes given by alumni or business organizations to star football players, I don't know what the outside world does.

I don't know what inducements an alumni organization might offer as an inducement to a star football player.

There are things in the way of jobs or positions, that might be given to these men at the University.

They are not paid for their work at those jobs.

They receive nothing for it.

We had a player there named John Bond in the fall of 1934.

He was from Toccoa, Georgia.

I know at one time he had a partial scholarship.

He was a star half-back; an excellent punter. He was also a son of an alumnus of the University.

I know Charles Turbeyville. He came to us from Milledgeville, Georgia, having graduated from the Georgia Military College, a secondary High School.

He was one of our players on the team in 1934.

I think he played guard or tackle. I cannot remember such technical questions.

I do not know whether he had a scholarship at the University.

I know Alfred W. Minot. He came to us from, I think, Staunton Military Academy in Virginia. I think his home was in New Jersey.

He was also one of the star players, he was a good player, half-back on the team.

I don't know whether he had a scholarship from the University.

o what course he was taking at the University,
l look at the record. I cannot answer that
any particular student in the University, what
he is registered for.

cognize the name of George R. Chapman.

vas one of the players on the team in 1934. He
om Winder, 20 miles from Athens, and Minot
Winder was his roommate.

oman did not have a scholarship, that I know

e had a scholarship, I could look over the rec-
d see.

THE COURT: Is that record here? A. No

cognize the name of Cy Grant. He was a half-
nd an outstanding player. I think he was
from Clarksville or Cornelia, Georgia. He had
larship. His scholarship would amount to the
and board and lodging.

ut $350.00.

member all of the men on that list of names
ndant's Exhibit 7) as being on the Varsity
in 1934, except three. I do not recall at this
t a young man named Earle, and O'Malley,
is other man here on the list. The others I can
ber.

With the exception of those three, I would say that represents the players on the Varsity Squad in 1934.

As to others on that list, who held scholarships in the University that year, as I just stated, we had from between 20 and 30 men on scholarships.

Q. Out of the entire squad—but you are unable to indicate on that list those, who held scholarships? A. I have answered the questions as to the ones, about which you asked me, but I would have to verify that with the list.

I can pick out others.

Others on that list who held scholarships were John McKnight, Henry Wagner, and Causey.

Those are the only ones I can remember without verifying.

As head of the Athletic Board, I am necessarily familiar with the financial transactions carried on by the Board. I examined the reports of the audits that were made and directed that they be made annually. I recognize "Defendant's Exhibit1", as a report of an audit made ot the Athletic Association.

Q. Calling your attention to some figures appearing on Page 2, particularly an item of $140.80 from baseball—does that represent a profit or a loss? A. This is not a detailed statement here. Not being in red, it is a profit there.

Q. And then directing your attention to an item page3 of $8,057.45 designed as "Students' room d board", what does that item represent. A. It presents just exactly what it states. It is room and ard paid.

Q. By the Athletic Association for students at-nding the University? A. Yes.

Q. Some of those students were members of the arsity football team? A. I would like to explain at item on there. I left theUniversity as the Presi-nt on August 31, 1935. I directed that every single em in the University be accounted for, and that ere be no indebtedness whatsoever, that I might rn it over to my successor in black. At that par-cular time that item was due for room and board some athletes, and perhaps by some of those, who ere not athletes. Our Treasurer keeps an itemized atement of each person, and no person can be in-ebted to the University except for board and room nt. This item is shown here as a disbursement. ow I directed therefore that we set up a student tivity sheet, and that that amount should be for is year and that year for the purpose of making holarships legitimate, and that there be no under-and methods used in the conduct of athletics. The outhern Conference, which I founded, was to pro-ct athletes, and make them outstanding for intel-ctual attainment, and the question of scholarships ame up at the last meeting of the Southern Confer-nce, and we stated that athletes should not be dis-riminated against, and all funds in the institution vailable for every student should be available for

athletes. Hence we stated we must specify the exact amount, that is given to every student from the loan fund, and contrast the number with the number of athletes. That action having been passed in the Southern Conference, they award a scholarship based upon a plan similar to the Rhodes scholarship. A certain amount of that money you refer to has been repaid, but at the time I was leaving the institution, and I directed that the allocation made to the Athletic Association, or that much of it, be not given to the Athletic Association but be used to pay the indebtedness of any student on the loan fund or scholarship, and that it be paid, and that accounts for that.

Q. This statement you have just outlined then became effected in the year 1935, and was not effective in prior years?

A. Not so clearly as I said. No one, as you well know, understands what is a scholarship in all institutions. What I might define as a scholarship in one institution, would not be so considered in another. We try to make scholarships on the same basis throughout our organization, and eliminate agreements. Once upon a time we had in the University trust funds such as the Brown trust fund and others. I could award from that fund to any other student than an athlete, but I couldn't award it to an athlete under the technical rulings of the Southern Conference. Now this discrimination we determined should not continue, and so it is now made clear that an athlete has the same opportunity to work in the

gymnasium, or work in the library, or elsewhere, as anybody else.

Q. I am asking you about what this item of $8,057.45, which appears to have been paid out by the Athletic Association for students' room and board, represents. Now you have been talking about board and room to be repaid. This shows it has been paid out by the Athletic Association.

A. No, except in bookkeeping. This is a student activity award, which I intended to allocate to the Athletic Association, but, when there existed an indebtedness on August 31st, I directed that that amount be retained for the payment of those fees.

BY THE COURT: When did you direct that, Doctor?

A. Some time in August, 1935.

Q. When was that audit made?

A. For the year ending August 31, 1935.

Q. So that that represents an expenditure from funds of the Athletic Association, so far as the entry shows?

A. So far as the entry shows, but it is not an expenditure of the Athletic Association, as I have explained.

Q. It is part of the money, that came in from the receipts of the Athletic Association?

A. It did not. It came from the funds, that I have tried to make clear that I have the power as President to allocate.

Q. Doctor, the other witnesses have testified that the University Athletic Association had no income except from receipts from admissions to games and student fees?

A. That is true.

Q. The point I am trying to make is that the student's admission fee is an available amount for this purpose?

A. Well, it can be for the Athletic Association whatever I allocate.

Q. And for the athletic fee you made a charge of ten dollars, didn't you, to each student?

A. Once upon a time the Catalogue carried the statement—prior to the reorganization the Catalogue carried the statement—that the amount required of each student was $120.00, specifying that of that $10.00 was for athletics, $5.00 for the library, $5.00 for the hospital, and so forth, but, when the Regents came in, the whole amount of money paid was named as one lump sum of $122.50, divided into quarterly payments. That left therefore the right in the President to allocate funds according to his wishes and the needs of the various extra-curricula activities. It happened at the end of a certain year we didn't have sufficient funds to pay the Faculty

of the University. We only could pay half for the closing month of the year. I then put $14,000.00 or whatever the amount was over on that side of it, in order that the Faculty might be paid.

Now we are talking specifically about what happened in the fall of 1934, and that audit shows receipts by the Athletic Association of students' fees to the amount of $23,214.29. Now that represents the amount of the tuition paid for an athletic fee. That represents the amount that was allocated.

Complainant next introduced in evidence Title Page, Paragraph 1, Page 1, and pages 9 through 14 of "Plaintiff's Exhibit 1," being Regulations for Guidance of Undergraduate Students of the University System at Athens for year 1935-1936, as follows:

PLAINTIFF'S EXHIBIT 1

"Regulations for Guidance of Undergraduate Students

The University of Georgia
1935-1936

Regulations for Guidance of
Undergraduate Students

Discipline and General Regulations

By action of the Regents, the legislative authority to establish rules and regulations for the immediate government of the University in all that relates to the order and discipline of the Institution is dele-

gated to the President and Faculty.

* * * * *

Eligibiilty for Student Activities

Two full courses per quarter is the minimum normal load for any student for participating in student activities. However, a student while engaging in an authorized activity may be registered for more than the normal load required.

A student who is on scholarship probation is not eligible for participation in any student activity or to represent the University or student body in any official capacity. This includes athletic teams, debating teams, glee clubs, dramatic clubs, student publications, campus leaders, Pan-Hellenic Council presidents, president of the Women's Student Council, or other activity which, in the judgment of the Administrative Dean and the Dean of Men and the Dean of Women, should be included.

Students on conduct or absence probation are in general ruled ineligible if, in the judgment of the Administrative Dean, the Dean of Men, and the Dean of Women, this action is advisable.

A student who is ineligible because of a conditional grade which placed him on probation may become eligible by removing this conditional grade.

Requirements for Graduation

Thirty-six courses plus Military Science (men) or Physical Education (women) are required for grad-

uation. A total of 72 quality points, 36 of which must be obtained in the Senior Division, must be obtained to qualify the student for graduation. No quality points may be obtained in the reqiured courses in Military Science or Physical Education. The grade of D (60-69) is not counted towards a major and in at least three-fourths of the total number of courses the grades must be C (70-79) or higher.

Athletic Ticket

Students will be admitted to all intercollegiate athletic contests upon presentation at Student Gate of Athletic Ticket issued from the office of the Business Manager of the Athletic Association. This ticket will be taken up and its right forfeited if presented by a person other than to whom issued. A duplicate ticket will be issued only upon presentation of proof of satisfactory evidence of loss or destruction of original and upon the payment of a fee of $2.00.

Conference Rules

The University of Georgia is a member of the Southeastern Conference and all students participating in intercollegiate athletics must comply with the regulations of that body. A copy of the Rules and Regulations of the Southeastern Conference can be had by applying to the Faculty Chairman of the Committee on Athletics or to the Director of Athletics. A condensed statement of the rules is given below. These rules apply to all sports.

In order to be eligible to represent the University in any intercollegiate athletic contest, a student:

1. Must be a bona fide matriculated student and present upon first entrance at least fifteen standard high school units and be regularly enrolled and be doing full work as defined by the regulations of the institution in which he is enrolled.

2. Must have been in residence for an entire scholastic year from date of first matriculation, and must have completed the scholastic requirements.

3. Must have been in the institution not less than one-half of the college year in which he participated in intercollegiate athletics.

4. Must not have participated in intercollegiate athletics at any other college or university.

5. Must not have participated in intercollegiate athletics more than one freshman and three varsity years over a period of five consecutive college years counting from date of first matriculation.

6. Must not have received any gift, remuneration, or pay for his services on a college team; must not hold any scholarship or loan except through the University officer or committee that usually administers such funds.

7. Must not sign a contract or enter into any agreement, explicit or implicit, with a professional team or compete with a professional for compensation.

8. Must meet the scholastic and attendance requirements of his institution and of the Conference.

9. Must not play on an athletic team other than his own during the college year.

Faculty Committee on Athletics

It is the duty of the Faculty Committee on Athletics to require a pledge in writing of the candidate, certifying on his honor that he is in the strict sense of the word an amateur and that he is eligible under the rules of the Conference and of the Institution to participate in intercollegiate athletics and to represent the Institution. Any student who wilfully makes any false or misleading statement or submits or causes to be submitted any false, spurious or misleading document, or fails or refuses to give full and complete information upon any matter relating to his eligibility shall thereby forfeit the privilege of competing thereafter in any intercollegiate sport. The eligibility of the candidate is determined by the Faculty Committee on Athletics.

Complainant next offered in evidence the following portions of "Plaintiff's Exhibit 2," being the General Catalogue of the University of Georgia for 1933-34: Pages 23 and 24; pages 218 through 223; pages 324, 327, 328, as follows:

PLAINTIFF'S EXHIBIT 2

Department of Athletics and Physical Education for Men

Herman Jerome Stegeman, Ph.B. (Chicago), M.A. (Beloit)

Associate Professor in charge of the Department

of Physical Education for Men; Director of Athletics.

Weems Oliver Baskin, B.S. (A.P.I.)
Assistant Professor of Physical Education for Men; Track Coach.

John Ellis Broadnax, B.S.C. (Georgia)
Freshman Athletics.

Rex Edward Enright, LL.B. (Notre Dame)
Assistant Professor of Physical Education for Men; Basketball Coach

Edwin Wilds Godbold, A.B. (S.C.), Captain, Cavalry, U.S.A.
Assistant Professor of Military Science; Lacrosse Coach.

Clarence Wilford Jones
Instructor in Physical Education for Men; Boxing and Swimming Coach.

Harold G. Holt, Captain, Cavalry, U.S.A.
Assistant Professor of Military Science; Polo Coach.

Harry James Mehre, Ph.B. (Notre Dame)
Associate Professor of Physical Education for Men; Football Coach.

Ivey Merwin Shiver, B.S.C. (Georgia)
Assistant Football and Baseball Coach.

Timothy Aloysius Twomey, Ph.B. (Notre Dame)
Assistant Football Coach.

William Pierce White
Baseball Coach.

Charles Edward Martin, A.B. (Georgia)
Manager of Ticket Sale and Business Manager.

William Oscar Payne, A.B., M.A. (Georgia)
Professor of History and Faculty Chairman of Athletics.

Physical Education — Men

Junior Division Courses

40. Physical Education. Hours to correspond with Military Schedule. One course. Fall, Winter, and Spring quarters.

Required of all Freshmen exempted from Military Science.

41. Physical Education. Hours to correspond with Military Schedule. One course. Fall, Winter, and Spring quarters.

Required of all Sophomores exempted from Military Science.

42. Physical Education. (Zoology 9 — Human Physiology). Five or six lectures per week. One course. Spring quarter. Mr. Boyd.

43. Individual Hygiene. Five or six lectures per week. One course. Winter quarter. Mr. Jones.

44. Introduction to Physical Education. Five or six lectures per week. One course. Fall quarter.

45. Methods of teaching physical education in High School. Five or six lectures per week. One course. Spring quarter.

Senior Division Courses

80. Theory and Practice of Physical Education. Football. Five lectures per week, with daily labora-

tory. One course if taken with laboratory; half course if taken without laboratory. Fall quarter. Mr. Mehre.

81. Theory and Practice of Physical Education. Basketball. Five lectures per week with daily laboratory. One course if taken with laboratory; half course if taken without laboratory. Winter quarter. Mr. Enright.

82. Theory and Practice of Physical Education. Track and Field. Five lectures per week, with daily laboratory. Single course if taken with laboratory; half course if taken without laboratory. Spring quarter. Mr. Baskin.

(Physical Education 80-81-82 form a triple half course for students taking these courses without laboratory work.)

83. Advanced Hygiene and Sanitation. Five lectures per week. Prerequisite: Physical Education 42. One course. Spring quarter. Dr. Reynolds.

84. Playground Management and Community Recreation. Five lectures per week. One course. Winter quarter.

85. Safety and Health Methods. Five lectures per week. One course. Spring quarter. Mr. Jones.

Red Cross Certification; rescue and resuscitation; safety methods in school and industry.

86. History and Theory of Physical Education. Five lectures per week. One course. Winter quarter.

Senior Division or Graduate Courses

87. Organization and Administration of Physical Education. Five lectures per week. One course. Winter quarter. Mr. Stegeman.

88. Physical Education Methods (Advanced course). Five lectures per week. One course. Prerequisite: Physical Education 45. Fall quarter.

89. Theory and Teaching of Corrective Gymnastics. Five periods per week. One course. Spring quarter.

Lecture and laboratory course.

Physical Education—Women

Junior Division Courses

1. Physical Education. Three periods, special lectures. One course. Fall, Winter and Spring quarters. Campus II and Campus III. Staff.

Athletics, dancing, swimming, natural and individual gymnastics scheduled to meet individual needs indicated by medical and physical examinations and previous physical education. Follow-up physical examinations, conferences, and health lectures.

2. Physical Education. Three periods, special lectures. One course. Fall, Winter and Spring quarters. Campus II and Campus III. Staff.

Continuation of Physical Education 1. Wider choice of activities permitted.

*4. Horsemanship. Two periods. Winter quarter. Campus II. Capt. Godbold.

Includes saddling, the aides, gaits, change of direction, suppling exercises, riding without stirrups, jumping and cross country riding. Written permission from parents or guardian. Physicians certificate required.

5. Introduction to Physical Education. Five recitations. One course. Winter quarter. Campus III. Mrs. Soule.

Brief historical survey of the field of health and physical education. Interpretations and objectives of physical education. Discussion of current literature.

7. Nature and Function of Play. Five recitations. One course. Prerequisite: Sophomore standing. Fall quarter. Campus III. Miss MacNaught.

(1) Study of the physical, psychological and social characteristics of children of various age levels, and games suitable to these ages;

(2) Technique of games of low organization and lead up games suitable for junior and senior high school girls. Achievement tests.

8. Leadership. Five recitations. One course. Prerequisite: Sophomore standing. Spring quarter. Campus III. Miss MacNaught.

(1) Community recreation; (2) study of girls' or-

ganizations, including Camp Fire, Girl Scout; (3) instruction and tests for Red Cross First Aid Certificate.

*10. The Dance. Three periods. One course. No credit. Fall, Winter, and Spring quarters. Campus III. Miss Morse

Representative folk and national forms of the dance including modern tap.

*15a. Swimming. Two periods. Half course. Two quarters. Campus II. Miss MacNaught.

Elementary swimming.

*15b. Swimming. Two periods. Half course. Two quarters. Campus II. Miss MacNaught.

Advanced swimming. Instruction and tests for Red Cross Life Saving Certificate.

Senior Division Courses

50. Sports. Four recitations, two laboratories. One course. Prerequisite: Section 1, Physical Education 1 and 2. Section 2, Physical Education 7 and 8. Section 1, elective. Section 2, required of all women students majoring in Physical Education. Section 1, Winter quarter. Section 2, Fall Quarter. Campus II. Miss MacNaught.

(1) Principles of coaching and officiating in field hocky, basketball, soccer, baseball, field, track, and archery. Instruction and tests toward Official Basketball Rating Certificate.

*55a. The Dance. Two periods. Half course. No credit. Fall, Winter, and Spring quarters. Campus II. Miss Morse.

Fundamental dance technique, rhythm training and elementary dance composition.

*55b. The Dance. Two periods. Half course. No credit. Prerequisite: Physical Education 55a. Fall Winter, and Spring quarters. Campus II. Miss Morse.

Continuation of 55a, advanced technique and dance composition, correlation of the dance with the other arts. Notebook required.

56. Theory of the Dance. Five recitations. One course Prerequisite: Physical Education 10-55. Fall quarter. Campus II. Miss Morse.

(1) The place of the dance art in modern education; (2) history and philosophy of the dance; (3) contemporary dance personalities.

60. Kinesiology. Five lectures. One course. Prerequisite: Anatomy and Physiology. Fall quarter. Campus II. Miss MacNaught.

A study of the mechanics of bodily movements.

61. Therapeutic Gymnastics. Five recitations. One course. Prerequisite: Physical Education 60. Winter quarter.

*Courses may be used by Senior Division students to meet requirements of Physical Education 1 or 2. Campus II. Miss MacNaught.

Study of common postural defects, and measures for their correction. Methods of examination, diagnoses and treatment. Adaptation of activities in corrective procedures.

62. Advanced Theraputic Gymnastics. Five recitations. One course. Prerequisite: Physical Education 61. Campus II. Miss MacNaught.

65. Personal and Community Hygiene. Five recitations. One course. Winter quarter. Campus II. Mrs. Soule.

(1) Personal hygiene, health values and current problems will be considered; (2) group and community hygiene.

69. Technique of Teaching Physical Education. Five recitations. One course. Prerequisite: Skill and knowledge tests in various activities. Campus II. Miss Morse.

Methods and practice in teaching all forms of dancing, swimming, gymnastics and other physical education activities.

70. Directed Teaching. Four laboratory periods. Individual and group conferences. One course. Prerequisite: Senior rating in Physical Education. Fall Winter, and Spring quarters. Campus II and Campus III. Mrs. Soule.

Assisting in undergraduate activity courses. Teaching in the practice school.

75. Principles, Philosophy, and History of Physical Education. Five recitations. One course. Prerequisite: Senior rating in Physical Education. Fall quarter. Campus II.

(1) General principles underlying science of Physical Education; study of aims and objectives. (2) History and modern trends in Physical Education.

76. Organization and Administration of Health and Physical Education. Five recitations. One course. Prerequisite: Physical Education 75. Winter quarter. Campus II. Mrs. Soule.

This course will consider the health and physical education program in the elementary school, high school, and college. Problems of procedure and methods of administration both of plant and program will be included.

University Eligibility Rule

Two full courses a quarter are the recognized normal load for any student for participating in student activities. However, a student while engaging in an authorized activity may be registered for more than the normal load required.

No student with any condition or failure standing against him shall be eligible to participate in student activities. This rule applies to all students engaged in authorized student activities.

A student having any condition or failure standing against him in his required normal load, or who

is on probation for any reason, is ineligible and his name cannot remain on the eligible list.

Eligibility may be restored by: (a) repeating the course and receiving a passing grade; (b) earning an average of one quality point on a program of at least three courses during the quarter immediately preceding restoration of eligibility; or (c) completing one full year of work. If restored to eligibility, the student shall be on warning until he has made a grade of 70 or better in all of the courses for which he is registered.

Eligibility Lists

After consulation with officials charged with the supervision of authorized student activities, the Administrative Dean shall prepare a list of all students engaged in major forms of extra-curricular activities. This list shall be known as the Eligibility List. The authorized activities are intercollegiate athletics, dramatic or music clubs, public debating, oratorical contests, and student publications.

Athletics

The University of Georgia is a member of the Southeastern Conference and all students participating in intercollegiate athletics must comply with the regulations of that body. A copy of the Rules and Regulations of the Southeastern Conference can be had by applying to the Faculty Chairman of the Committee on Athletics or to the Director of Athletics. A condensed statement of the rules is given below. These rules apply to all sports.

In order to be eligible to represent the University in any intercollegiate athletic contest, a student:

1. Must be a bona fide matriculated student and present upon first entrance at least fifteen standard high school units and be regularly enrolled and be doing full work as defined by the regulations of the institution in which he is enrolled.

2. Must have been in residence for an entire scholastic year from date of first matriculation, and must have completed the scholastic requirements.

3. Must have been in the institution not less than one-half of the college year in which he participated in intercollegiate athletics.

4. Must not have participated in intercollegiate athletics at any other college or university, that is, he must not be a migrant student.

5. Must not have participated in intercollegiate athletics more than one freshman and three varsity years over a period of five consecutive college years counting from date of first matriculation.

6. Must not have received any gift, remuneration, or pay for his services on a college team; must not hold any scholarship or loan except through the University officer or committee that usually administers such funds.

7. Must not sign a contract or enter into any agreement, explicit or implicit, with a professional

team or compete with a professional for compensation.

8. Must meet the scholastic and attendance requirements of his institution and of the Conference.

9. Must not play on an athletic team other than his own during the college year.

Faculty Committee On Athletics

It is the duty of the Faculty Committee on Athletics to require a pledge in writing of the candidate, certifying on his honor that he is in the strict sense of the word an amateur and that he is eligible under the rules of the Conference and of the Institution to participate in intercollegiate athletics and to represent the Institution. Any student who wilfully makes any false or misleading statement or submits or causes to be submitted any false, spurious or misleading document, or fails or refuses to give full and complete information upon any matter relating to his eligibility shall thereby forfeit the privilege of competing thereafter in any intercollegiate sport. The eligibility of the candidate is determined by the Faculty Committee on Athletics.

Complainant next offered in evidence "Defendant's Exhibit 1," being a report of Examination by the State Auditor of the accounts of the University of Georgia Athletic Association for the year ended August 31, 1935, as follows:

Copy page 186—Defendant's Exhibit 1

No. 35 A 25

EXAMINATION OF ACCOUNTS

UNIVERSITY OF GEORGIA

ATHLETIC ASSOCIATION

YEAR ENDING AUGUST 31, 1935

Tom Wisdom
State Auditor.

Honorable Eugene Talmadge,
Governor of Georgia,
Atlanta, Georgia.

Dear Sir:

I hand you herein my report of an examination of the books and records of the

UNIVERSITY OF GEORGIA
ATHLETIC ASSOCIATION,

for the period

YEAR ENDING AUGUST 31, 1935

as follows:

	Page
COMMENTS	1
CURRENT FUND BALANCE SHEET	1
STATEMENT OF RECEIPTS AND PAYMENTS	2-3
DETAIL OF PERSONAL SERVICES	4-6
DETAIL OF TRAVEL EXPENSE	4-6
DETAIL OF BALANCES	7
DETAIL OF ACCOUNTS PAYABLE	8
DETAIL OF LOANS PAYABLE	9
DETAIL OF INSURANCE & SURETY BONDS	11

Respectfully submitted,

(Signed) Tom Wisdom,
State Auditor.

Atlanta, Georgia,
December 6, 1935.

— C O M M E N T S —

SCOPE OF EXAMINATION

This examination of the books of record of the University of Georgia Athletic Association for the period of year ended August 31, 1935, including funds received and disbursed directly by the Treasurer of the Athletic Association and as agent by the Treasurer of the University of Georgia.

All recorded receipts were traced to the bank accounts as deposits and verified with the daily sale records wherever such records were located. All checks were compared to the book of original entry and these books reconciled with the bank accounts. Payments were verified with requisitions from the Director of Athletics.

This report is made on a Cash Receipt and Disbursement basis.

CURRENT FUND BALANCE SHEET

This statement presented on page 1 gives the financial condition of the Association at August 31, 1935.

STATEMENT OF RECEIPTS AND PAYMENTS

This statement presented on pages 2 and 3 shows receipts and payments for the year ended August 31, 1935.

Under receipts from sports, guarantees have been deducted from receipts rather than shown as a payment.

GENERAL

Detail of personal services and travel are shown on pages 4-6.

Detail of Accounts Payable are shown on page 8 and Loans Payable on page 9.

Detail of Surety Bond and Insurance in force are shown on page 11.

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

CURRENT CASH BALANCE SHEET AUGUST 31, 1935

ASSETS

Cash - Anal p 7		$ 8 857 13

LIABILITIES

Accounts Payable - Anal p 8	$19 373 47	
Loans Payable - Anal p 9	53 400 00	$72 773 47
RESERVE FOR PRIVATE TRUST FUNDS		
Tax funds awaiting court decision		10 596 83
TOTAL Liabilities		$83 370 30
DEFICIT		
Liabilities and Reserve in excess of assets		74 513 17
TOTAL		$ 8 857 13.

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

STATEMENT OF RECEIPTS AND PAYMENTS
YEAR ENDED AUGUST 31, 1935

RECEIPTS

INCOME

Student Fees			$ 23 214 29
Duplicate Athletic Tickets			18 00
Radio			2 000 00
Sport Receipts:*			
Football	$ 71 323 27		
Tax	5 264 33	$ 66 058 94	
Baseball		140 80	
Basketball	200 18		
Tax	40 48	159 70	

Boxing	63 35		
Tax	5 45	57 90	
Track		17 20	
Golf		70 00	
Tennis		45 00	
Swimming		25 00	66 260 14
Donations			15 00
Miscellaneous			112 80
TOTAL Income Receipts			$ 91 620 23

NON-INCOME

Loans Payable		31 900 00	
Tax - awaiting court decision	5 310 26		
Interest on money the in savings account	70 05	5 380 31	
TOTAL Non-Income Receipts			37 280 31

TOTAL Receipts			$128 900 54
BALANCES - September 1, 1934			
For Operations:			
In Banks	232 90		
Due from University of Georgia	18 28	251 18	
For Private Trust Funds			
Tax Account		5 216 52	5 467 70
TOTALS			$134 368 24

* NOTE - Guarantees deducted from receipts.

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION
STATEMENT OF RECEIPTS AND PAYMENTS
YEAR ENDED AUGUST 31, 1935

PAYMENTS

EXPENSE

Personal Services - Anal p 6		$ 45 658 34
Travel Expense - Anal p 6		14 466 00
Supplies		3 931 39
Communication		728 70
Heat, Light, Water service		756 65
Stamping - Printing		
Red and Black	$ 1 650 00	
Other	777 59	2 427 59
Repairs and Alterations		1 257 30
Rents		401 00
Insurance and Bonding		2 430 99
Interest		2 697 96

271

Equipment			10 600 62
Miscellaneous			
Students Room and Board		8 057 45	
Other		1 097 12	9 154 57
TOTAL Expense Payments			$ 94 511 11
NON-EXPENSE			
Loans Payable			31 000 00
TOTAL Payments			$125 511 11
BALANCES - August 31, 1935, Anal p 7			
For Operations:			
In banks (net overdraft)	$ 2 005 06		
Due from University of Georgia	265 36	1 739 70	
For Private Trust Funds:			
Tax Account		10 596 83	8 857 13
TOTALS			$134 368 24

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

DETAIL OF PERSONAL SERVICES AND TRAVEL, YEAR ENDED AUGUST 31, 1935

	PERSONAL SERVICES	TRAVEL EXPENSE
Aiken T	$ 780 00	$
Athens Country Club	288 85	
Bachelor G	327 50	
Band Members		328 75
Bael G T	4 50	
Baseball Team		298 83
Basketball Team		183 32
Baskin W O - Asst Coach	2 471 86	62 50
Black Charlie - Referee	7 50	
Black Jack - Official	135 00	
Bennett J C Asst Coach	1 490 00	
Bennett Tiger	10 00	8 75
Bolton J D		6 00
Boxing Team		577 21
Brice M - Official	70 50	
Broadnax J E - Freshman Coach	2 699 70	451 50
Brown Bertie Sue	5 00	
Burch J M - Carpenter	1 036 62	
Camp E		70 00
Cabaniss Dr W H	40 00	
Christopher A	572 00	
Cole L	3 00	

Cortin A L	4 50	
Danforth E		70 00
Dodd Oakey F - Clerk	71 87	
Dozier Tom		4 00
Ducote J R	184 20	
Ennis J		12 00
Enright Rex - Asst Coach	4 950 00	77 50
Football Team & Attachees		7 524 68
Frost F H - Physical Education	1 710 00	
Gardner M O - Official	61 25	
Golf Team		38 68
Goss Dr Ralph	170 00	
Grummond E - Custodian of Equipment	810 00	3 72
	30 00	
Hayes J	492 00	
Hayes Manuel	22 00	
Epps Lucile	45 00	
Halligan Jas - Official	102 20	
Heach F S - Official	80 55	
Heckman H M - C P A	300 00	
Hirsch and Smith	25 58	
Horn Wendall	51 00	
Howell Hollis - Referee	87 50	
Hutchins A R - Official	107 10	

Jones C W - Trainer	$ 2 962 70	$ 28 75
Kalkmann G W	79 60	
Kalkman Fred - Official	79 60	
Kingery		30 30

Kilpatrick M E		91 41
Lipscomb J	572 00	
Linsey Paul	163 00	
Maddox W M	42 50	
Maddox W T	120 50	
Martin C E - Treasurer	3 240 00	879 95
Martin John	67 50	
Mayes W A	1 50	
McGill R		70 00
McMasters O M - Official	101 80	
Mehre H J - Head Coach	7 632 50	75 20
Michael Max		5 50
Miday E F	15 00	
Miller C	11 40	
Monat John - Official	76 60	
Mumma Major - Official	60 50	
Murray Mrs	5 00	
O'Sullivan M M - Official	58 25	
Payne W O	500 00	20 00
Philpot T M - Referee	50 00	
Piedmont Hospital	572 82	
Raisty L		7 00
Salt E Ben		68 50
Sanford J V		159 16
Scott Alfred - Chance Chunk		38 74
Short A B	20 50	
Short J D	19 00	
Short Rex	5 00	
Short Serg	1 75	
Shiver I M - Asst Coach	1 714 40	152 90
Slate Tom - Referee	73 25	
Smith V - Asst Coach	2 541 63	99 70
Spann Helen - Nurse	18 00	
Stark P	469 00	

2755

Stegeman H J - Director of Athletics	3 150 00	993 95
Sutherland Ed	45 00	
Sutherlin Dr M T	148 00	
Swimming Team		30 80
Tennis Team		59 00
Tarpley W R	5 00	
Thomas Charles	267 50	
Thornton Dr Lawton	270 00	

Page 6.

Tichenor W R - Official	$ 122 50	$
Timm Albert H	15 00	
Towns Forrest		14 71
Track Team		466 83
Tucker G	5 00	
University Infirmary	35 25	
Undistributed	670 55	1 456 16
Ware Dr S J	37 00	
Weismuller O M	72 02	
Weaver John	6 72	
Wilson Troutman	280 00	
Willis John	6 72	
TOTAL	$45 658 34	$14 466 00

DETAIL OF BALANCES
AUGUST 31, 1935

FOR OPERATIONS

Trust Company of Georgia - Atlanta		
Balance per bank	$ 2 818 64	
Deduct outstanding check (detail on file)	4 904 09	
Balance per books		$ 2 085 45
Citizens and Southern National Bank		
Balance per bank - per book		1 20
National Bank of Athens		
Balance per bank - per books		79 19
TOTAL of banks for operations		$ 2 005 06
Due from Treasurer of the University of Georgia		265 36
TOTAL for operations		$ 1 739 70

277

FOR PRIVATE TRUST FUNDS

Citizens and Southern National Bank, Athens	
Savings Account	10 596 83
TOTAL all Balances	$ 8 857 13

DETAIL OF ACCOUNTS PAYABLE
AUGUST 31, 1935

Athens Hardware Co	$	10 51
Arnett's Studio		1 50
Atlanta Athletic Club		35 50
Allen Hardware Co		6 80
Athens Water Works		7 60
Bernstein Furniture Co		15 00
Capps W A		1 50
Champion Knitwear		1 692 87
Dixie Hotel		8 00
Dozier Co		6 00
John K Davis & Sons		3 10
Epps Electric Co		6 90
Georgia Public Utilities		9 11
Georgia Wholesale Co		9 38
Goodwyn Dr		50 00
Georgia Coop		150 00
Hodgson Oil Refining Co		5 33
Journal Engraving Co		191 88
Crawford W Long Hospital		121 15
Lake & Ayers Drs		25 00
Laurence Dr Chas E		10 00
McGregor Co		720 25
Michael Bros		314 00
Moss R L Mfg Co		1 50
Norris Hardware Co		4 65
Osbrink R H Mfg Co		15 00
O'Shea Knitting Mills		3 888 10
Page Steel & Wire Fence Co		6 52
Penny J C Co		579 92

Parks Chambers Co		3 449 45
Phoenix Supply Co		15 08
Piedmont Hospital		184 48
Riddell John T		920 40
Selig The Co		172 00
Spalding A G Co - Open Account	$ 1 301 40	
Note	4 848 75	
		6 150 15
Stanley Studios		132 00
Standard College		11 55
Thronton Dr Lawton		355 00
Talmadge Bros		2 30
Webb-Crawford Co		3 35
Western Union		14 04
West Disinfectant Co		29 09
Woodruff Ins Co		37 50
TOTAL		$19 373 47

DETAIL OF LOANS PAYABLE
AUGUST 31, 1935

DATE	PAYEE	MATURITY	AMOUNT
6- 1-35	Trust Company of Georgia	8-30-35	$ 4 700 00
7- 1-35	" " "	9-30-35	4 300 00
7-23-35	" " "	10- 2-35	9 000 00
7-26-35	" " "	10-24-35	25 000 00
8- 1-35	" " "	8-30-35	5 400 00
8- 1-35	" " "	8-31-35	5 000 00
	TOTAL		$53 400 00

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

DETAIL OF INSURANCE AND BONDS
AUGUST 31, 1935

NUMBER	COMPANY	COVERAGE	AMOUNT	PREMIUM	DATE	EXPIRATION		AGENT
3276	American Eagle - G. S.	Schedule (*)	$ 1 000 00	$ 101 20	5-8-31	5-8-36		Lipscomb Dearing Hutchins Co
6575	Aetna Ins Co - G. S.	" (*)	4 600 00	296 70	2-16-35	2-16-36		" " "
101814	Commerical Union	Toilets	3 000 00	118 50	9-11-32	9-11-35	R	" " "
		Office Building	2 500 00					
		Club House	1 000 00					
		Press Box	500 00					
		Concession Building	500 00					
102011	" "	Athletic Equipment	7 500 00	23 06	9-3-34	9-3-35	R	" " "
5397	Continental Ins Co	Schedule (*)-G. S.	2 500 00	64 50	9-14-34	9-14-35	R	" " "
2675	Fidelity Phoenix Ins Co	" (*)-G. S.	1 000 00	25 80	2-6-35	2-6-35		" " "
D715989	Firemans Fund	" (*)-G. S.	1 000 00	25 80	2-6-35	2-6-36		Thos M Tillman
4814	Hartford Fire Ins Co	Woodruff Hall	5 000 00	34 00	3-6-35	3-6-36		Lipscomb Dearing Hutchins Co
3320	National Liberty	" "	5 000 00	34 00	11-3-34	11-3-35	R	Dubose and Dubose
184000	North British & Mercantile	" "	5 000 00	34 00	3-6-35	3-6-36		Lipscomb Dearing Hutchins
			$40 100 00					

(*) SCHEDULE:

Frame Grand Stand	$10 000 00
Bleachers	500 00
Fencing	500 00
	$11 000 00

BURGLARY AND ROBBERY

B0355789	National Casualty Co	Burglary	$10 000 00	Expires 11-30-35
		Robbery	20 000 00	

FIDELITY BOND

147506	Aetna Casualty and Surety Co	$15 000 00	C E Martin, Treas	Date 9-1-29	Premium	$37 50

BLANK

PAGE

Complainant next offered in evidence "Plaintiff's Exhibit 5", being Title Page and pages 28, 29, 30, 31, 32, and 33 of the Regulations for students of the School of Technology at Atlanta, as follows:

BULLETIN

of the

GEORGIA SCHOOL

of

TECHNOLOGY

Vol. XXIX Dec. 1932 No. 5

REGULATIONS

for

STUDENTS

Published by the Georgia
School of Technology

Atlanta, Georgia

Entered at the Post Office at Atlanta, Ga., as Second Class Matter Under Act of Congress of July 16, 1894. Acceptance for mailing at special rate of postage provided in section 1103, Act of October 3, 1917 authorized.

* * * * * * * * * * * * *

46. Participation.

No person shall take part in any contest, performance, or other activity representing the Georgia School of Technology unless he is at that time duly enrolled in the institution. Students are subject to the following regulations:

a. No student shall participate in more than three activities of any kind during the year. Not more than two of these activities may be sports, except by Faculty permission. Not more than two activities may be participated in at any one time. See section 48b.

Activities shall count as follows: Football 1, Baseball 1, Track 1, Basketball 1, Golf 1, Swimming 1, Tennis 1, Lacrosse 1, Glee, Mandolin Club and Orchestra combined 1, and Dramatic Club 2.

b. Students will not be excused to participate in outside activities for at least one week before term examinations, and no contest, performance, dance or banquet shall be scheduled during this period.

c. All public performances, including fraternity and club dances and banquets are limited to Friday and Saturday afternoons and evenings, except by Faculty permission.

d. Students of the Georgia School of Technology shall not attend banquets given by or for them at

which alcoholic beverages are served to any one in any manner.

GENERAL ATHLETIC REGULATIONS

47. Eligibility.

A list of students desiring to participate in athletic activities must be submitted at the beginning of the season for approval to the Committee on Standings by the Faculty Chairman of Athletics. Before a student can participate in any athletic sport he must qualify under the following regulations.

a. No student who is carrying a schedule in less than 12 hours will be eligible to participate in intercollegiate athletics.

b. A student who is on probation for poor work or who has a excessive number of absences is ineligible for intercollegiate athletics unless otherwise ruled by the Committee on Standings.

c. Any student may be removed from the athletic list and declared ineligible for further participation in intercollegiate contests if in the opinion of the Committee on Standings, he has too full a schedule, or is doing exceptionally poor work in one major subject where the remainder of his schedule consists of easy courses.

d. No student will be eligible to participate in intercollegiate athletics subsequent to graduation from this institution unless he is a bona-fide candidate

for a Master's degree, to be received during the scholastic year in which he wishes to participate, and is otherwise eligible under the rules of the Southern Conference.

48. Participation.

Students taking part in any athletic sport are subject to the following rules:

a. No student will be excused from recitation for athletic practice.

b. No student will be allowed to participate in more than two sports in any scholastic year, except by Faculty action. Being manager or assistant manager of any team is counted as participating in that sport within the meaning of this rule.

c. No team will be allowed to leave the city to play any team other than that of an educational institution except by Faculty action.

d. During the scholastic year students will not be allowed to play on any team which does not represent officially the Georgia School of Technology.

e. All teams leaving the city will be accompanied by a representative of the Faculty.

f. No signs, writings, or drawings which unduly excite or affect, or tend to unduly excite or affect the feelings or resentment of any visiting team or student body shall be exhibited or posted on the athletic

field or grounds of the Georgia School of Technology during any intercollegiate athletic contest. The Faculty Chairman of Athletics is charged with the enforcement of this rule.

SPECIAL ATHLETIC REGULATIONS

49. Football.

a. The football team will be allowed to make 3 trips only; an intersectional trip, and 2 trips in Southern Conference territory.

b. A schedule of 9 collegiate games with a maximum of 4 working days absence is allowed.

c. Football candidates may sign out at 3:30 P. M. in September and October and at 3 P. M. in November.

d. The season ends the first Saturday after Thanksgiving Day.

50. Baseball.

a. A schedule of 26 collegiate games with a maximum of seven days absence is allowed, not more than 4½ days absence to be taken at one time.

b. The baseball season begins March 15th, and closes one week before the beginning of the final examinations.

c. All baseball games begin at 4 P. M. except on Saturdays and holidays, on which they begin at 3 P. M. No signouts are allowed.

51. Basketball.

a. A schedule of 16 games with a maximum of 5 working days absence is allowed.

b. During the examination period only one game is allowed, and this game must be played on Saturday.

52. Track.

A schedule of 8 spring and 3 winter meets, with a maximum of 5 working days absence is allowed. Meets are to be held on Friday and Saturday.

53. Tennis.

A schedule of 11 matches, including the school tournament, with a maximum of 5.5 days absence is allowed.

54. Swimming.

A schedule of 8 matches, including the school tournament, with a maximum of 5.5 days absence is allowed

55. Lacrosse.

A schedule of 10 games, with a maximum of 5.5 days absence is allowed.

56. Golf.

A schedule of 9 matches, including the school tournament, with a maximum of 5.5 days absence is allowed.

57. Freshman Teams.

a. Football. A schedule of 5 games with a maximum of 4 working days absence is allowed with signouts as in Section 49c.

b. Baseball. A schedule of 12 games with a maximum of 4½ working days absence is allowed. For time of games, etc., see Section 50.

c. Basketball. A schedule of 10 games with a maximum of 4 working days absence is allowed.

d. Track, Swimming and Lacrosse are allowed schedules of 5 contests each, with 2 working days absence allowed.

58. Any exceptions to the above athletic regulations, as to number of games, date of schedule, or time of play, must have the approval of the Faculty before the games are scheduled.

* * * * * * * * * * * * *

Complainant next offered in evidence "Plaintiff's Exhibit 4", being a specimen of the football admission ticket at the School of Technology, as follows:

ALABAMA - GEORGIA TECH
SATURDAY, NOVEMBER 17, 1934 - 2 P. M.

5 GRANT FIELD	5 SOUTH STAND	
Estab. Price $1.36	Gate 11	
	Sec. G	
*Tax .14 Total $1.50	Row 4	
(See other side)		
NON REDEEMABLE	Seat 24	

On reverse side of ticket was a diagram of Grant Field and the following:

*School of Technology being an Instrumentality of the Government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the School of Technology is required to do so by Treasury Regulations pending a decision as to its liability in this respect. This amount is collected by the School of Technology as a part of the admission and will be retained as such unless it is finally determined that the School of Technology is itself liable for the tax.

* * * * * * * * * * * * *

Complainant next offered in evidence pages 171 and 172 of "Plaintiff's Exhibit 6", being the Athletic Department, as shown in the Bulletin of the School of Technology of Atlanta, published by the Faculty, for the year 1933-34, as follows:

THE GEORGIA TECH ATHLETIC ASSOCIATION

BOARD OF DIRECTORS
Faculty Members

Pres. M. L. Brittain, Chairman.
Dr. J. B. Crenshaw.
Prof. Floyd Field, Secretary-Treasurer.
Prof. A. H. Armstrong, Faculty Chairman of Athletics, Business Manager

Dean William V. Skiles
Dr. G. H. Boggs
Prof. T. H. Noel
W. A. Alexander, Advisory Member, Athletic Director.

ALUMNI MEMBERS

L. W. Robert
George W. McCarthy, Jr.
Robert T. Jones

STUDENT MEMBERS

H. C. Neblett, Captain 1932 Football Team.
Willard Turnbull, Editor of The Technique.
Iven Allen, Jr., President of Student Council.

COLLEGE ATHLETICS.

College Athletics at the Georgia School of Technology are managed by a Board of Directors consisting of six member of the Faculty, appointed by the President, who is ex-officio chairman of the Board; three alumni appointed by the president of the school; the President of the Student Council, the captain of the football team, and the editor of the Technique. This board aims to secure co-operation of the faculty and students in athletic affairs, to maintain the highest standards of sportsmanship, to give every student an opportunity to take part in some athletic activity. The liberal policy adopted by the Faculty toward athletics has resulted in such interest in college sports that the number engaged in some form of outdoor exercise is very large—over fifty per cent—and is increasing yearly.

TENNIS

The most popular addition made in recent years to the athletic equipment of the school was effected last year by the construction of eight splendid tennis courts, the best in Atlanta and the equal of any in the Southern Conference. These courts are open free of charge to students and faculty. More students are now participating in tennis than in any other sport.

FENCING

This sport, which is fostered by the R. O. T. C., is in reality a student club of young men who have been taught for the last three years by Prof. R. T. Morenus of the Department of Architecture.

HUGH INMAN GRANT FIELD

The liberality of Mr. John W. Grant of Atlanta, whose donations for this purpose have reached the sum of fifty thousand dollars, aided by gifts from other friends of the institution, have provided the school with an athletic field 900 feet long and 450 feet wide. This field has been named the "Hugh Inman Grant Field" as a memorial to Mr. Grant's son.

STADIUM

Upon this field has been developed a splendid U-shaped stadium 410 feet in length with locker-rooms, bath-rooms, stock-rooms, coaches' offices and a running track under cover for early spring practice. The total seating capacity, with temporary wooden stands

built in on the north end, is over 35,000. Grant Field, with its quarter mile track, its 220-yard straightaway, and this stadium, has been added to the equipment of the school at a cost of $350,000.

THE ROSE BOWL FIELD

In order to provide space for outdoor sports the Board of Directors of the Georgia Tech Athletic Association purchased at the close of the 1928 football season a new field 450 by 980 feet within three minutes walk of Grant Field. Thoroughly developed and equipped with a modern steel and concrete baseball stand, it provides space for two baseball fields, two football fields and a lacrosse field. To commemorate the victory over the University of California at Pasadena, New Year's Day, 1929, this field has been named "Rose Bowl Field."

* * * * * * * * * * * * *

Complainant next offered in evidence "Defendant's Exhibit 3", being the Report of the Examination of the Accounts of the Georgia Tech Athletic Association for the six months ended December 31, 1934, as follows:

DEFENDANT'S EXHIBIT 3

GEORGIA TECH ATHLETIC ASSOCIATION

REPORT ON
EXAMINATION OF ACCOUNTS
FOR THE SIX MONTHS ENDED
DECEMBER 31, 1934

HASKIN & SELLS

HASKIN & SELLS
Accounants

Healey Building
Atlanta

February 13, 1935.

Georgia Tech Athletic Association,
Atlanta, Georgia.

Dear Sirs:

We have made an examination of your accounts for the six months ended December 31, 1934, and present our report consisting of the following financial statements, our certificate, and comment:

Balance Sheet, December 31, 1934 (Exhibit A).

Statement of Income and Expenses For the Six Months Ended December 31, 1934 (Exhibit B).
Expenses - Football, Basket-ball, Baseball, Track, Minor Sports, and Intramural Sports (Schedule 1).

Statement of Cash Receipts and Disbursements For the Six Months Ended December 31, 1934 (Exhibit C).

The property valuations are based on an appraisal made by Jesse M. Shelton, Architect, as of January 1, 1931, plus subsequent net additions at cost. (The property is owned by the University System of the State of Georgia and is carried on the books of the Association for memorandum purposes only.)

The Association has not paid the Federal tax on admissions to football and basket-ball games for the years 1933 and 1934, and contends that as an instrumentailty of the State of Georgia it is not liable for such tax. However, the net amount of the tax; $23,423.66, has been deposited in special bank accounts pending the outcome of the litigation. We were informed by Professor A. H. Armstrong, Business Manager, that the Court has ruled that the Association is not liable in any event for penalties arising from failure to pay this tax when due.

The Association has a liability of an undetermined amount to the Georgia School of Technology for supplies, food, etc., furnished to the Association during the past several years. The amount of this liability, when determined, will be applied as an offset to the advance of $20,000.00 made to the Georgia School of Technology. A reserve for contingencies of $15,000.00 has been provided, which, in the opinion of Professor Armstrong, is adequate to cover this liability.

In our opinion, subject to the foregoing, the accompanying balance sheet, related statement of income and expenses, and statement of cash receipts and disbursements, with the notations thereon, fairly present your financial condition at December 31, 1934, the results of your operations, and your cash receipts and disbursements, as recorded, for the six months ended December 31, 1934.

CASH - $22,658.21

The cash on hand was counted, and that on deposit was verified by certifications obtained from the depositary.

As shown in Exhibit A, the above amount includes $23,731.71 on deposit with The First National Bank of Atlanta, Georgia, in special tax accounts. Of this amount $23,423.66 is being retained pending the final determination of the liability of the Association for Federal tax on admissions, and $308.05 represents interest credited by the bank.

ACCOUNTS RECEIVABLE (employees, etc.) - $340.77

The accounts receivable at December 31, 1934, were as follows:

Name	Amount
A. H. Armstrong (Business Manager)	$100.82
Charles M. Griffin (Asst. Business Mgr.)	25.90
Others:	
R. H. Martin	36.00
J. W. Morgan	3.75
C. H. Roberts	3.93
Southeastern Conference	.74
Alfred E. Thompson	90.00
University of Georgia	79.63
Total	$340.77

Checks were received in January, 1935, in payment of the accounts of the University of Georgia and Mr. J. W. Morgan. The other accounts were verified by confirmations received from the debtors.

GEORGIA SCHOOL OF TECHNOLOGY
$20,000.00

This amount was advanced by check dated May 8, 1928, to the Georgia School of Technology as authorized by the Athletic Board on February 8, 1928. The advance was to be non-interest bearing and payable in full or in part at the expiration of three years. The advance matured May 8, 1931, and to the date of this report no collections have been received.

As an offset against the advance, the Association has an unrecorded liability of an undetermined amount for supplies, food, etc., furnished by the school to the Association during the past several years. We were informed by Professor Armstrong that no statements showing the amount of the liability had been received from the school, and at his request we did not attempt to ascertain the amount thereof, or to confirm the amount of the advance. However, in his opinion the reserve for contingencies, amounting to $15,000.00 (see comments, Page 7), is adequate to cover the liability to the school for supplies, food, etc.

PROPERTY - $771,892.52

The property valuations are based on an appraisal made by Jesse M. Shelton, Architect, as of January 1, 1931, plus subsequent net additions at cost. The

property is owned by the University System of the State of Georgia and is carried on the books of the Association for memorandum purposes only.

BUILDINGS, STANDS, ETC., - GRANT FIELD - $310,580.00

The North Stands, which were of wooden construction, were dismantled during the six months ended December 31, 1934. Following is a summary of the changes in the account:

Balance, June 30, 1934			$317,900.00
Deduct:			
North Stands:			
As appraised	$ 6,000.00		
Incidental costs, 6%	360.00	$6,360.00	
Basket-ball court (destroyed by fire in 1931):			
As appraised	$16,000.00		
Incidental costs, 6%	960.00		
Total	$16.960.00		
As written off in 1931	16,000.00	960.00	
Total [charged against the investment account]			7,320.00
Balance, December 31, 1934			$310,580.00

IMPROVEMENTS - GRANT FIELD - $44,502.00

Following is a summary of the changes in the account:

Balance, June 30, 1934		$ 49,802.00
Deduct - Temporary stands dismantled:		
As appraised	$5,000.00	
Incidental costs, 6%	300.00	
Total [charged against the investment account]		5,300.00
Balance, December 31, 1934		$ 44,502.00

NOTES PAYABLE - $70,471.16

THE FIRST NATIONAL BANK OF ATLANTA, ATLANTA, GEORGIA - $31,401.33

These notes, bearing interest at the annual rate of 6%, were as follows:

Date	Maturity	Amount
July 2, 1934	Aug. 1, 1934	$30,000.00
Dec. 17, 1934	Demand	904.00
*Dec. 27, 1934	Jan. 26, 1935	497.33
Total		$31,401.33

*Personal note of Professor A. H. Armstrong and Charles M. Griffin given for the account of the Association.

The accrued interest on the above notes at December 31, 1934, amount to approximately $75.00, is not

recorded on the books or included in the accompanying statements.

As security for these notes, the bank holds an assignment of the Association's share of the football gate receipts, including advance sales of tickets, for all seasons until this indebtedness, or any renewal thereof, is paid.

PETERS LAND CO. - $23,250.00

This amount is the balance due on two notes dated September 1, 1928, for $16,250.00 each, covering the purchase of land on which Rose Bowl Field is located. The notes matured on September 1, 1931 and September 1, 1932, but continue to bear interest at the annual rate of 5%.

The balance due on the notes, $23,250.00, and the accrued interest thereon, $7,501.22, at December 31, 1934, were verified by correspondence with the holder of the notes.

During the six months ended December 31, 1934, the principal amount of the notes was reduced $4,500.00

SALARIES - $8,935.02

The following salaries represented by non-negotiable, non-interest bearing notes of the Association were unpaid December 31, 1934.

Name		Amount
A. H. Armstrong		$1,125.00
Charles M. Griffin		250.00
Mrs. R. L. Williamson		300.00
W. A. Alexander:		
Salary	$4,800.00	
Jack Cannon [assigned]	125.00	
R. L. Dodd [assigned]	290.00	5,215.00
R. L. Dodd		305.00
Roy Mundorff		400.00
Mack Tharpe		200.00
Geo. C. Griffin		690.00
Kenneth Thrash		150.02
J. D. Smith		200.00
H. F. Bartlett		100.00
Total		$8,935.02

These notes were confirmed by correspondence with the holders thereof.

OTHER - $6,884.81

These notes were as follows:

Payee	Date	Maturity	Interest Rate	Amount
W. A. Alexander,	Jan. 31, 1933	Demand	None	$ 100.00
"	Feb. 28, 1934	Demand	"	122.33
A. G. Spalding & Bros.,	Jan. 12, 1935	Oct. 1, 1935	6%	6,250.98
"	"	"	6%	411.50
	Total			$6,884.81

The notes of A. G. Spalding & Bros., while dated January 12, 1935, were issued as of December 31, 1934.

ACCOUNTS PAYABLE - $15,697.71

GEORGIA SCHOOL OF TECHNOLOGY
(Georgia Tech Emergency Loan Fund) - $1,212.53

This amount represents the liability of the Association to the Georgia Tech Emergency Loan Fund for collections received from concessions during the 1934 football season. At the date of this report no collections had been received by the Association from the football program concession. We were informed that payment for this concession had been made direct to the loan fund by Mr. Charles M. Griffin.

JESSE M. SHELTON (Plans - new gymnasium) $4,700.00

This amount covers the balance due to Jesse M. Shelton, Architect, for plans for a new gymnasium.

FEDERAL TAX ON ADMISSIONS - $23,423.66

This amount represents the tax on admissions to football games and basket-ball games for the years 1933 and 1934, which has not been paid to the Federal Government. Although the Federal tax on admissions was paid for the year 1932, the Association contends that it is not liable for the tax collected for the 1933 and 1934 seasons. However, the amount of the tax

has been deposited in special bank accounts pending the final determination of the matter. We were informed by Professor Armstrong that the Court has ruled that the Association is not liable in any event for penalties arising from failure to pay this tax when due.

RESERVE FOR CONTINGENCIES - $15,000.00

This amount has been provided by the Association chiefly for an undetermined liability to the Georgia School of Technology for supplies, food, etc., furnished to the Association during the past several years.

GENERAL

Following is a summary of the insurance in force at December 31, 1934, as evidenced by policies submitted for our inspection:

Fire:	
Grant Field - Uniforms and athletic equipment	$13,000.00
Radio broadcasting room and equipment [fire, $10,000; theft, $4,000.00]	14,000.00
Furniture and fixtures	4,500.00
Trophies	1,500.00
Automobile truck [fire and theft]	Actual cash value
Liability [maximum]:	
Automobile truck	$20,000.00
Public	20,000.00
Builders' risk - Naval Armory	10,000.00
Burglary:	
Safe	2,000.00
Trophies	1,252.00
Casualty [A. H. Armstrong]	10,000.00

Fidelity bonds were carried on officers and employees, as follows:

Name	Amount
A. H. Armstrong [Business Manager]	$10,000.00
Floyd Field [Secretary and Treasurer]	5,000.00
Charles M. Griffin [Assistant to Business Manager]	5,000.00
Mrs. R. L. Williamson [Bookkeeper]	5,000.00

The unexpired premiums on the foregoing policies and bonds, amounting to approximately $665.00 at December 31, 1934, are included in the expenses of the Association.

The books and records were accurately and neatly kept, and we received the full co-operation of the officers and employees of the Association during our examination.

Yours truly,

(Signed) HASKIN & SELLS.

EXHIBIT A

GEORGIA TECH ATHLETIC ASSOCIATION

BALANCE SHEET, DECEMBER 31, 1934

ASSETS

CASH:			
On hand [petty cash fund]		$ 478.95	
On deposit - The First National Bank of Atlanta, Atlanta, Georgia:			
Regular account [overdraft]		1,552.45	
Tax account	$15,973.99		
Tax account [1933-1935]	7,757.72	23,731.71	$ 22,658.21
ACCOUNTS RECEIVABLE [employees, etc.]			340.77
GEORGIA SCHOOL OF TECHNOLOGY - ADVANCE MADE MAY 8, 1928 [see notation]			$ 20,000.00
PROPERTY [based on appraisal made by Jesse M. Shelton, Architect, as of January 1, 1931, plus subsequent net additions at cost; owned by the University System of the State of Georgia, and carried on the books of the Association for memorandum purposes only]:			
Land			$254,400.00
Buildings, stands, etc:			
Grant Field			310,580.00
Rose Bowl Field			74,200.00
Improvements:			
Grant Field		44,502.00	
Rose Bowl Field		42,559.00	
Tennis Courts		7,526.43	
Athletic equipment		25,452.00	
Small tools, etc.		4,371.75	

Office furniture and fixtures	2,386.63	
Plans - New gymnasium	5,000.00	
Naval Armory	914.71	771,892.52
TOTAL		$814,891.50

LIABILITIES

NOTES PAYABLE:		
The First National Bank of Atlanta, Atlanta, Georgia [future football receipts pledged as security]	$ 31,401.33	
Peters Land Co. [two 5% notes dated September 1, 1928; past due]	23,250.00	
Salaries	8,935.02	
Other	6,884.81	$ 70,471.16
ACCOUNTS PAYABLE:		
Georgia School of Technology [Georgia Tech Emergency Loan Fund]	$ 1,212.53	
Jesse M. Shelton [Plans - New gymnasium	4,700.00	
Other	9,785.18	15,697.71
ACCRUED INTEREST - PETERS LAND CO.		7,501.22
FEDERAL TAX ON ADMISSIONS [see notation]		23,423.66
RESERVE FOR CONTINGENCIES [see notation]		15,000.00
INVESTMENT ACCOUNT, PER EXHIBIT B [see notation]		682,797.75
TOTAL		$814,891.50

NOTATIONS: The property of the Association is owned by the University System of the State of Georgia. The property and investment ac-

counts are carried on the books of the Association for record purposes only.

The Georgia Tech Athletic Association has not paid the Federal tax on admissions to football and basket-ball games for the years 1933 and 1934, and contends that as an instrumentality of the State of Georgia it is not liable for such tax. However, the net amount of the tax, $23,423.66, has been deposited in special bank accounts pending the outcome of the litigation. We were informed by Professor A. H. Armstrong, Business Manager, that the Court has ruled that the Association is not liable in any event for penalties arising from failure to pay this tax when due.

(Continued)–1.

The Association has a liability of an undetermined amount to the Georgia School of Technology for supplies, food, etc., furnished to the Association during the past several years. The amount of this liability, when determined, will be applied as an offset to the advance of $20,000.00 to the Georgia School of Technology. A reserve for contingencies of $15,000.00 has been provided, which, in the opinion of Professor Armstrong, is adequate to cover this liability.

EXHIBIT B

GEORGIA TECH ATHLETIC ASSOCIATION

STATEMENT OF INCOME AND EXPENSES FOR THE SIX MONTHS ENDED DECEMBER 31, 1934

INCOME:		
Football:		
Sales of tickets	$ 74,168.51	
Guaranties received	44,798.29	$118,966.80
Sale of band uniforms and instruments		250.00
Rental of Grant Field		30.00
Interest on bank balances		189.95
TOTAL		$119,436.75
EXPENSES:		
Schedule 1:		
Football		$ 59,648.34
Basket-ball		327.60
Baseball		751.80
Track		236.75
Minor sports		120.30
Intramural sports		306.10
Training and equipment room		2,747.41
Yellow Jacket Club		115.18
Salaries		16,864.50
Interest		2,119.07
Insurance premiums	776.61	
Auditing	125.00	
Dues and subscriptions	135.00	
Light, heat, and water	406.98	
Office supplies and expenses	498.41	
Telephone and telegraph	208.18	
Traveling expenses	135.00	
Laundry	626.15	

Federal tax on checks	8.50	
Miscellaneous	58.10	
TOTAL		85,914.98
INCOME IN EXCESS OF EXPENSES		$ 33,521.77
INVESTMENT ACCOUNT, JUNE 30, 1934		661,895.98
TOTAL		$695,417.75
DEDUCT - PROPERTY DISMANTLED AND REMOVED, WRITTEN OFF:		
North Stands, etc.	$ 7,320.00	
Temporary stands	5,300.00	12,620.00
INVESTMENT ACCOUNT, DECEMBER 31, 1934 (see notations on Exhibit A)		$682,797.75

EXHIBIT C

GEORGIA TECH ATHLETIC ASSOCIATION

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS FOR THE SIX MONTHS ENDED DECEMBER 31, 1934

BALANCE, JUNE 30, 1934		$ 16,138.38
RECEIPTS:		
Football	$127,002.72	
Sale of band uniforms and instruments	250.00	
Rental of Grant Field	30.00	
Interest on bank balances	189.95	
Concessions	2,500.00	
Notes payable	1,097.33	

TOTAL		131,07
Total balance and receipts		$147,20
DISBURSEMENTS:		
Football	$ 46,427.08	
Track - Net	131.25	
Minor sports	10.50	
Training and equipment room	25.95	
Salaries	16,354.50	
Interest	565.75	
Light, heat, and water	406.98	
Office supplies and expenses	90.53	
Telephone and telegraph	208.18	
Traveling - General	10.00	
Federal tax on checks	8.50	
Accounts payable	11,025.80	
Notes payable	42,938.37	
Equipment - Naval Armory	914.71	
Personal advances (Georgia Tech Emergency Loan Fund)	2,571.70	
Automobile allowance	125.00	
Insurance	58.02	
Change funds [used for payment of football payroll]	1,212.05	
Grant Field:		
Labor	1,642.07	
Material	24.51	
Accounts receivable - Net	46.12	
Sundry	15.10	
TOTAL		124,550
BALANCE:		
On hand [petty cash fund]	$ 478.95	
On deposit - The First National Bank of Atlanta, Atlanta, Georgia:		
Regular account [overdraft]	1,552.45	
Tax account	15,973.99	
Tax account [1934-1935]	7,757.72	$ 22,658

SCHEULE 1

GEORGIA TECH ATHLETIC ASSOCIATION

EXPENSES - FOOTBALL, BASKET-BALL, BASE-BALL, TRACK, MINOR SPORTS, AND IN-TRAMURAL SPORTS FOR THE SIX MONTHS ENDED DECEMBER 31, 1934

FOOTBALL:		
Entertainment		$ 377.33
Equipment		6,534.93
Fees and expenses of officials		1,569.45
Guaranties paid to other schools		32,342.21
Insurance		761.80
Maintenance of playing fields:		
Labor	$ 762.84	
Materials	1,642.07	2,404.91
Medical expenses		997.65
Pay-rolls		2,368.85
Postage		273.50
Printing, stationery, office supplies, etc.		1,362.54
Publicity		323.00
Scouting		600.16
Traveling		8,790.94
Trophies		46.40
Tutoring		829.50
Miscellaneous		65.17
TOTAL		$ 59,648.34
BASKET-BALL:		
Equipment		314.65
Miscellaneous		12.95
TOTAL		$ 327.60
BASEBALL - EQUIPMENT		$ 751.80

TRACK:		
Equipment	$	373.00
Trophies		3.00
Traveling expense refund		133.25
TOTAL	$	236.75
MINOR SPORTS:		
Golf - Miscellaneous	$	18.90
Swimming - Miscellaneous		.50
Tennis - Miscellaneous		100.90
TOTAL	$	120.30
INTRAMURAL SPORTS - EQUIPMENT	$	306.10

Complainant next offered in evidence Exhibits F and G to the bill of Complaint, being original Bulletins of the University of Georgia, which are printed elsewhere in the record, appearing on pages 25 and 38.

* * * * * * * * * * * *

Complainant next offered in evidence "Plaintiff's Exhibit 8", being the By-Laws of the University of Georgia Athletic Association in effect during 1934, as follows:

Plaintiff's Exhibit 8

BY-LAWS
of the
UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

1
PURPOSES

The purposes and functions of the Association shall be as stated in its charter.

2
MEMBERSHIP

The membership of the corporation shall consist of the petitioners for the charter and of such other persons as may be hereafter admitted to membership, which shall automatically include any person hereafter made members of the Board of Directors or Executive Board, hereinafter provided for. Students of the University of Georgia (by which is meant in this connection, Franklin College, the State College of Agriculture and the Mechanic Arts, and the Georgia State College of Agriculture), in good standing, and whose dues or fees to the Association, in the event dues or fees are required by the Trustees of the University or the Faculty, are paid, shall be members in the sense that they shall be entitled to the benefits resulting to students from the operation of the Association, but shall not be members in the sense of having a vote in the

management or control of the affairs of the Association.

3

THE BOARD OF DIRECTORS

The affairs and business of the Association shall be under the control of a Board of Directors, which shall consist of the petitioners for the charter, and of such other directors as may be selected and qualified from time to time. The said Board shall have general control of the business and affairs of the Association; subject, however, to the express provision that all operations of the Association shall be subject to the the control and direction of the Chancellor of the University and the Board of Trustees of the University of Georgia, said Board of Directors, or the Executive Board hereinafter named, shall have authority to contract debts in behalf of the Association, to authorize the issuance of bonds in its behalf, and to pledge the credit and property of the Association for the payment of its debts.

4

MEMBERSHIP IN THE BOARD OF DIRECTORS

Said Board of Directors, as first constituted, shall consist of the petitioners for the charter. The Board of Directors thus constituted shall have authority to select, from time to time, successors to any directors dying, retiring, or being removed, and to increase the membership by the election of additional directors. The membership of the Board of Directors shall serve for life; subject, however, to the provisions that any

member of the Board may be removed therefrom, with or without cause, by a vote of the majority of the Board, by which is meant a majority of all the members of the Board, or may similarly be removed by a written order of the Chancellor of the University, or by action of the Board of Trustees of the University of Georgia. The Chancellor of the University shall be President of the Board of Directors, and there shall be a Vice-President, elected by the Board, who shall serve as President in the latter's absence. The Board shall meet once a year, and at other times when called by the President, or by direction of the Executive Board. Three days' written notice by mail shall be given of such meetings. Depositing the letters in the mail, addressed to the last address of the members as shown by the records of the Association, shall be sufficient.

5.
EXECUTIVE BOARD

There shall be an Executive Board, constituted as follows: The Chancellor of the University, the President of the Georgia State College of Agriculture, and the Dean of the University, shall be ex-officio members of the Executive Board. The Chancellor shall designate, from time to time, at his pleasure, three members of the faculty, in addition to the foregoing, who shall also be members of the Executive Board. Three Trustees of the University of Georgia, to be designated by the Board of Trustees from time to time, at the pleasure of the Board, shall also be members of the Executive Board. In addition to the foregoing, there shall be five alumni members of the Executive Board, two from Athens, and three not from Athens,

and one member of the Board from Athens who is not an alumnus; all of whom shall be designated by the Directors of the Athletic Association to continue in office at the pleasure of the Directors, and until their successors are elected. The Executive Board shall be competent to function whenever its membership shall consist of a majority of those hereinabove designated, and a majority of the existing membership, at any time, shall be competent to act. The Executive Board shall exercise all the powers of the Directors of the Association whenever the Directors are not in session. The Chancellor of the University shall be Chairman of the Executive Board, and the Board shall name a Vice-Chairman, who shall serve as Chairman in the latter's absence. The Board shall meet when called by the Chairman. It shall be the duty of the Chairman to endeavor to give notice to all members of the Board, but meetings shall be valid whether actual notice has been delivered or not, provided a majority of the Board assembles, and an effort has been made, at least, twenty-four hours before that time, to notify all members.

6.
OFFICERS OF THE ASSOCIATION

The President of the Board of Directors shall be President, and the Board shall elect a Secretary of the Athletic Association, which selection shall be made from those who are also members of the Executive Board. The Secretary shall hold office at the pleasure of the Board of Directors, and the President and Secretary shall perform such duties as are usually incidental to similar officers in similar associations. They

may sign contracts, notes, and bonds, as directed by the Directors or the Executive Board, but either of these bodies may designate other persons to sign such instruments in behalf of the Association.

There shall also be a Treasurer of the Athletic Association, to be designated by the Executive Board, who shall have general charge of the funds of the Association. It is expressly provided, however, that the detailed operations of the Association, the handling of receipts from games and exhibitions, the payment of its operating expenses, and similar matters, shall be handled by the Faculty Chairman of Athletics of the University of Georgia, and by such associates and assistants as the Chancellor of the University may from time to time direct, who shall make an annual report to the Treasurer of the Association, with a statement of what surplus is available for investment or for payment on notes or bonds of the Association, and shall remit such surplus to the Treasurer for this purpose. The current handling of the funds of the Association may be through the Treasurer of the University of Georgia. There shall be an annual audit of the finances of the Association, which shall be made, if possible, by the State Auditor of the State of Georgia; and in the event this is not feasible, by an accountant to be designated by the Executive Board, which said annual audit shall be laid before the members of the Executive Board of the Association.

7.
AMENDMENTS

These by-laws may be amended by a majority vote

at any meeting of the Directors, by which is meant a majority of all members of the Board; provided, that the notice calling such meeting shall specify in general the nature of the amendment to be considered.

Complainant next offered in evidence "Plaintiff's Exhibit 9", being Minutes showing a Resolution of the Board of Regents of the University System, held April 10, 1935, to which offer defendant objected for the reasons that it is irrelevant, immaterial, and incompetent; it is not binding on the defendant; it purports to be a resolution directing the State Auditor to make an examination of certain records of the Athletic Association involved in this proceeding, undoubtedly pursuant to the authority contained in an Act of the Legislature adopted in 1935, after the period involved in this suit, and after this suit was instituted. This objection was overruled by the Court, to which ruling of the Court defendant did then and there except. "Plaintiff's Exhibit 9", so offered and received in evidence, is as follows:

PLAINTIFF'S EXHIBIT 9

"EXCERPTS FROM MINUTES OF MEETING OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA HELD APRIL 10, 1935:

Vol. 3 - Page 119

"Upon motion of Regent Ault, seconded by Regent Dunwody and unanimously carried, the following resolution was adopted:

"RESOLVED that the State Auditor is requested by this Board, as a part of his auditing of the University System of Georgia, to audit also the Athletic Associations at the University of Georgia at Athens and the Georgia School of Technology at Atlanta, which said Athletic Associations have been and are, with the consent of the Board of Regents, conducting the athletic activities of said institutions. This request for an audit is to continue so long as said associations are continued by this Board for said purpose and until otherwise ordered.' "

Complainant next offered in evidence "Plaintiff's Exhibit 10", being claim for refund as follows:

PLAINTIFF'S EXHIBIT 10

Treasury Department
Internal Revenue Service
Form 843 - Jan. 1922
Comptroller General U. S.
Jan. 18, 1922

Collector's Notation
District

CLAIM FOR
X REFUND OF TAXES ILLEGALLY COLLECTED

320

STATE OF GEORGIA,)
) ss:
COUNTY OF FULTON)

Type or Print: Georgia Tech Athletic Association, a department of the Georgia School of Technology, in turn a branch of the University of Georgia (name of Taxpayer).

North Avenue, Atlanta, Georgia

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference

to said statement are true and complete:

1. Business in which engaged: See statement below; not engaged in business.

2. Character of assessment or tax—Admissions to athletic contests. Period From From

3. Amount of assessment or stamps purchased.....$

4. Reduction of Tax Liability requested (Income and Profit Tax).....$

5. Amount to be abated $11,181.62, plus 6% from dates of payment

6. Amount to be refunded (or such greater amount as is legally refundable) $11,181.62 plus 6%

7. Dates of payment (see Collector's receipts or indorsements of canceled checks (If statement covers income tax liability, items 8-11 inclusive must be answered.)

Nov. 14, 1932	$1,230.69
Nov. 29, 1932	3,880.68
Dec. 8, 1932	5,848.80
Feb. 14, 1933	158.33
Feb. 28, 1933	63.12
	$11,181.62

8. District in which return (if any) was filed Atlanta, Georgia

321

11. Unpaid assessment against which credit is asked; period from Deponent verily believes that this application should be allowed for the following reasons:

This claim for refund is filed on behalf of and by the Georgia Tech Athletic Association, which is simply a department of the Georgia School of Technology, which in turn is a branch of the University of Georgia, which in turn is one of the educational branches or political subdivisions of the State of Georgia.

The taxes above set out were collected by J. T. Rose, Collector of Internal Revenue for the Atlanta, Georgia, district, based on admissions paid to the Georgia Tech Athletic Association covering athletic contests, to-wit, football games, etc., between teams representing Georgia School of Technology and teams of other Universities. The athletic program of intercollegiate contests is a part and parcel of the educational functions of the Georgia School of Technology. The admissions charged for athletic contests do not inure to the benefit of any person or group of persons, but go into the funds of the Athletic Department known as the Georgia Tech Athletic Association and help to defray the expenses of intercollegiate as well as intermural athletics under the physical training program of the Athletic Department.

The educational system, of which the University of Georgia, including the branch known as the Georgia School of Technology and its department known as the Georgia Tech Ath-

letic Association, is an instrumentality or political subdivision of the government of the State of Georgia and as such can not be taxed by Congress or by the Federal Government. The tax collected, therefore, was illegally collected, for the stated reason that it was tax on an instrumentality or political subdivision of the government of the State of Georgia.

It is the contention of taxpayer that the Revenue Act of 1932, Section 711, is not intended to impose a tax on an instrumentality or political subdivision of the State government. If the Act be so construed, however, it is taxpayer's contention that the same is invalid and unconstitutional as exceeding the taxing power of Congress.

It is not intended by using the name "taxpayer" in this claim for refund to waive any rights or to describe the characteristics or the status of the Georgia School of Technology, the word "taxpayer" being used merely for convenience.

Sworn to and subscribed
before me this 26th day
of June, 1933.

(sgd) Florence England,
Notary Public, Fulton County,
Georgia.

(Signed: GEORGIA SCHOOL OF
TECHNOLOGY (SEAL)
By: M. L. Brittain,
President.

Complainant next offered in evidence "Plaintiff's Exhibit 11", being letter from the Commissioner of Internal Revenue addressed to Georgia Tech Athletic Association, Georgia School of Technology, dated October 11, 1933, as follows:

PLAINTIFF'S EXHIBIT 11

"TREASURY DEPARTMENT
Washington

Oct. 11, 1933

Georgia Tech Athletic Association,
Georgia School of Technology,
Atlanta, Georgia.

Attention: Mr. M. L. Brittain

Gentlemen:

Reference is made to the claim filed by you for refund of $11,181.62, tax paid on admissions to athletic contests under the provisions of section 500 (a) of the Revenue Act of 1926 as amended by section 711 (a) of the Revenue Act of 1932.

It is contended that the association is a department of the School of Technology which is a branch of the University of Georgia, and that the university is an educational department or political subdivision of the State of Georgia and exempt from taxation.

Subdivision (e) of section 500 of the Revenue Act of 1926, which was added by section 711 (c) of the

Revenue Act of 1932, provides that the exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition, the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States.)

Section 500(a) of the Revenue Act of 1926 as amended by section 711 (a) of the Revenue Act of 1932, which imposes a tax on the amount paid for admission to any place is the admission charge exceeds 40 cents, specifically provides that the tax shall be paid by the persons paying the admission charges. Thus the tax does not fall upon the university or the athletic association but upon the persons admitted to the athletic events and the university merely acts as collecting agency in collecting the tax due and paying it over to the collector of internal revenue. The admission charges and the free or complimentary admissions to the athletic contests of the Georgia Tech Athletic Association are therefore properly subject to tax. The evidence on file shows that the tax claimed in refund was collected from the persons admitted to the contests and was not paid from the funds of the association or the university.

The claim is therefore rejected in full.

Respectfully,

Guy T. Helvering,
Commissioner.

By

(sgd) D. S. Bliss,
Acting Deputy Commissioner."

RR:RLS
cc-Atlanta, Georgia.

Complainant next offered in evidence "Plaintiff's Exhibit 12", being letter dated April 26, 1934, from the Commissioner of Internal Revenue to Georgia Tech Athletic Association, Georgia School of Technology, as follows:

PLAINTIFF'S EXHIBIT 12

Apr 26 1934

Georgia Tech Athletic Association,
Georgia School of Technology
c/o Harold Hirsch & Marion Smith,
701 Hurt Building,
Atlanta, Georgia.

Gentlemen:

Reference is made to the claim filed by you for refund of $11,181.62, tax paid on admissions for the months of November, 1932 to February, 1933, inclusive.

The tax in question was collected from the public on admission charges to athletic events, the proceeds of which inured to the benefit of the Association, a department of the Georgia School of Technology, which is a branch of the University of Georgia.

It is contended that the University of Georgia is a political subdivision of the State of Georgia; that the athletic program of intercollegiate contests is a part of the educational function of the school; that the tax is unconstitutional since it applies to a State

agency; and that the imposing of a tax upon persons purchasing tickets to football contests curtails the revenue realized by collecting agency and thus hinders the exercise of the governmental function.

"Section 500 (a) (1) of the Revenue Act of 1926, as amended by section 711 (a) of the Revenue Act of 1932, imposes a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission.

Thus the tax is imposed upon the persons paying the admission charges and not upon the persons collecting the admission charges to the athletic contests or other events.

Section 500 (b) (1) (a) of the Revenue Act of 1926 provides that no tax shall be levied under this title in respect of any admissions all of the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, if no part of the net earnings thereof inures to the benefit of any private stockholders or individuals. Section 500 (b) of the Revenue Act of 1926 was amended by section 711 (c) of the Revenue Act of 1932 to provide that the exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition, the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States.) No exemption was made in the case of colleges or universities which are maintained in part from funds of a State.

Since the tax in question was collected from the public and was not paid from the funds of the Georgia Tech Athletic Association or the Georgia School of Technology, the burden of tax was not borne by the University of Georgia. The fact that the addition of an item of tax to the admission charge may possibly have resulted in the sale of fewer tickets of admission does not result in placing the burden of tax directly upon the University or its branches.

It is held that the tax in question was properly collected and paid over to the collector of internal revenue and the claim is therefore rejected in full.

Respectfully,

Guy T. Helvering,
Commissioner.
By (sgd) Adelbert Christy,
Acting Deputy Commissioner.

cc-Atlanta, Georgia
cc-Files
WJR/DEE

cc-Georgia Tech Athletic Assn.,
Georgia School of Technology,
North Avenue,
Atlanta, Georgia."

Thereupon, Complainant rested its case.

Complainant having rested its case, defendant presented his Motion to Dismiss the Bill of Complaint

upon the specific grounds therein stated. The Motion to Dismiss was submitted without argument, and the Court reserved its ruling.

DEFENDANT'S CASE

Thereupon, the following facts were stipulated and agreed to by council for the respective parties and read into the record, as follows:

The defendant, W. E. Page, was appointed United States Collector of Internal Revenue on June 20, 1933, and ever since than has been Collector of Internal Revenue for the District of Georgia; during all of the said time he was and now is a resident of the Northern District of Georgia, and his official residence is Atlanta.

No returns for admissions tax on admissions to athletic events held at the University of Georgia and Georgia Tech under the auspices of the University of Georgia Athletic Association and Georgia Tech Athletic Association, during September and October, 1934, were ever made and filed with the Collector of Internal Revenue. Returns, covering the amount of $895.37 for claimed admissions tax on admissions at the University of Georgia and $3,914.63 at Georgia Tech, were prepared by the Collector of Internal Revenue. Neither of those amounts claimed by the Collector as tax have been paid.

Defendant next introduced in evidence "Defendant's Exhibit 2", being copy of the application for charter

of Georgia Tech Athletic Association, and the Order of the Court on such application, as follows:

DEFENDANT'S EXHIBIT 2

"Georgia, Fulton County.

TO THE SUPERIOR COURT OF SAID COUNTY:

The petition of M. L. Brittain, W. V. Skiles, J. B. Crenshaw, G. H. Boggs, Floyd Field, A. H. Armstrong, T. W. Noel, W. A. Alexander, L. W. Robert, Jr., R. T. Jones, Jr., George W. McCarty, Jr., Oscar Davis, I. L. Kuniansky, B. L. Mattingly, R. H. Tharpe and E. E. Laws, all of Fulton County, Georgia, respectfully shows to the court:

1. That your petitioners desire for themselves, their associates, successors and assigns to be incorporated and made a body politic under the laws of the State of Georgia and under the name and style of

GEORGIA TECH ATHLETIC ASSOCIATION

for a period of twenty (20) years with the privilege of renewal at the expiration of said time.

2. That the principal office and place of business of said corporation shall be in Fulton County, Georgia, but petitioners desire the right for said corporation to establish branch offices within this State or elsewhere whenever a majority of the directors of the corporation shall so determine.

3. That said corporation shall have no capital stock.

4. That the object of said corporation is not pecuniary gain or profit to its members but is to promote the general welfare of the student body of The Georgia School of Technology by affording facilities and encouraging participation in healthful exercises, recreation, athletic games and contests.

5. That petitioners desire for said corporation the right and power to do all things necessary or incidental to the accomplishment of such purposes, including, without limitation, the right and power:

(a) To purchase, lease, receive, own, sell and generally trade in and deal with real property, both improved and unimproved.

(b) To improve real property by erecting thereon buildings and stadia, and by generally making the same suitable and useful for exercise, recreation and athletic games and contests.

(c) To purchase and otherwise acquire personal property of all kinds and particularly to purchase and provide for its members, equipment for participating in athletic games and contests.

(d) To arrange, hold and conduct athletic games and contests in its own stadia and buildings and in the stadia and buildings of others, and to charge and receive fees of admission to such games and contests.

133
1

(e) To borrow money and to execute all proper evidences of indebtedness and to secure the payment of same in any lawful manner.

(f) To lend money and be secured for the repayment of same in any lawful manner.

(g) To acquire, in any lawful manner, and to hold, own, sell and generally trade in and deal with stocks and bonds of other corporations.

(h) To receive and accept donations by gift or will.

(i) To sell, lease, convey and otherwise lawfully dispose of all or any of its property as its board of directors shall from time to time determine.

6. Petitioners desire however that the powers, especially enumerated herein, shall not be held to limit the general powers of the corporation, and petitioners desire for said corporation authority to exercise all of the powers usually incident to corporations of like nature, including the power to have and use a common seal, to make contracts, to sue and be sued in its corporate name, to make and adopt a constitution and all by-laws and regulations necessary or desirable for the successful accomplishment of the purposes of the corporation, and to establish, revoke and amend, at its pleasure, any and all lawful rules and regulations governing the qualification, conduct, admission, expulsion and suspension of its members.

7. Petitioners specify as one of the charter conditions

to which all membership in said corporation shall be subject, that upon the death, resignation or expulsion of any member, or the termination of his membership for any cause whatsoever, all his right and interest in said corporation shall cease, so that neither he nor his heirs, assigns or representatives shall have any interest in or claim upon any of the property of said corporation or its funds or income, whether previously or subsequently acquired, nor be entitled to demand or receive any dividend or distributive share thereof, whether declared or distributed during the existence of said association or upon its dissolution, provided that nothing herein contained shall impair the right of any person ceasing to be a member to hold or enforce against said association any bond or other debt incurred by the association upon or for a consideration other than that of membership therein.

8. That petitioners desire for said corporation power and authority to apply for and accept amendments to its charter, of either form or substance, and to wind up its affairs and surrender its charter at any time it may determine to do so by the vote of the majority of its then duly constituted directors.

WHEREFORE, petitioners pray that this petition be filed, published and recorded as required by law, and that they be incorporated under the name and style as aforesaid, and that said corporation have all the rights, powers, privileges and immunities hereinabove set forth or which are allowed to corporations of like nature by the laws of Georgia, and that all orders necessary or proper to these ends be entered;

and your petitioners will ever pray, etc.

Jones, Evins, Powers & Jones,
Attorneys for Petitioners.

Filed in office this the 8 day of March, 1934.

J. W. Simmons Clerk Superior Court, Fulton County, Georgia.

ORDER

GEORGIA,
FULTON COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY:

The Foregoing petition of M. L. Brittain, W. V. Skiles, J. B. Crenshaw, G. H. Boggs, Floyd Field, A. H. Armstrong, T. W. Noel, W. A. Alexander, L. W. Robert, Jr., R. T. Jones, Jr., George W. McCarty, Jr., Oscar Davis, I. L. Kuniansky, B. L. Mattingly, R. H. Tharpe and E. E. Laws coming on regularly to be heard, and having been read and considered, and it appearing that said petition was properly filed in the office of the Clerk of this Court and has been published as required by law, and that all provisions of law with respect to such matters have been duly complied with and that the objects of said petition come within the purview of the laws of Georgia.

IT IS ORDERED: That the prayers of said petition be, and the same is hereby granted, and that

e, and the same is hereby chartered as a corporation nder the laws of the State of Georgia, with perpetual uccession for a period of twenty (20) years and the ight of renewal at the expiration of said time by omplying with the laws of Georgia in such matters. Ordered further that said corporation have all the ights, powers and privileges prayed for in said petition, nd all other rights, powers and privileges which are llowed to corporations of a like nature by the laws f Georgia.

Let this judgment be filed and recorded in this Court and the same is hereby declared, along with certified copy of said petition, to be evidence of said ncorporation and said charter

In Open Court, this 14th day of April, 1934.

(signed) Virlyn B. Moore,
Judge, Superior Court,
Fulton County.

Defendant next introduced in evidence "Plaintiff's xhibit 3", being copy of the original application for harter and order thereon allowed the University of eorgia Athletic Association, as follows:

PLAINTIFF'S EXHIBIT 3

"In re:	)	No. 5387
	)	
University of Georgia	)	Clarke Superior Court
	)	
Athletic Association	)	Petition for Charter
	)	
CHARTER	)	Filed in office Jan. 7th, 1928 - E. J. Crawford, Clerk.

G E O R G I A,
CLARKE COUNTY.

TO THE SUPERIOR COURT OF SAID COUNTY:

The petition of Charles M. Snelling, A. M. Soule, S. V. Sanford, T. S. Mell, Blanton Fortson, A. C. Erwin, A. G. Dudley, E. H. Dorsey, H. H. Gordon, Jr., John Welch, Mike Costa, E. E. Lamkin, R. P. White, Hugh J. Rowe, M. P. McWhorter, H. J. Stegeman, W. D. Hooper, M. P. Jarnagin, W. O. Payne, of Clarke County, Georgia, Harold Hirsch, Marion Smith, E. W. Moise and Daniel MacDougald of Fulton County Georgia, and G. C. Woodruff, Frank Foley, and L. D. Hill, of Muscogee County, Georgia, respectfully showeth:

1. That your petitioners desire, for themselves and their associates, to become incorporated and be be made a body corporate and politic under the laws of Georgia under the name and style of

2. That said corporation will have no capital stock.

3. That the object of said corporation is not profit or pecuniary gain to its members, but is to promote the physical and moral welfare of the student body of the University of Georgia by encouraging participation in healthful exercise, recreation, athletic games and contests, and for that purpose to erect a stadium or stadia and other suitable buildings; to provide adequate equipment for its members participating in such exercise, games and contests; to arrange and hold athletic contests in its own stadium or buildings or in the stadia or buildings of others; and to charge fees of admission to such games and contests in order to defray the expenses of said corporation and to accomplish its purpose.

4. That the principal office and place of business of said corporation shall be in Clarke County, Georgia, but petitioners desire the right to establish branch offices within or without the State whenever a majority of the directors shall so determine.

5. That petitioners desire to become incorporated for the full period of twenty years with the privilege of renewal, when and as often as it may lawfully be done.

6. That petitioners desire authority for said corportation to sue and be sued; to plead and be impleaded; to contract and be contracted with; to have and use a common seal; to be invested with all the powers,

rights, franchises and privileges necessary or proper for the successful accomplishment of its objects, including all the powers generally provided by law for corporations; to adopt a constitution and to make such by-laws, rules and regulations as it may desire, and to establish, revoke and amend, at its pleasure, any and all lawful rules governing the qualification, conduct, admission, expulsion, and suspension of its members.

7. Petitioners specify as one of the charter conditions to which all membership in said corporation shall be subject, that upon the death, resignation or expulsion of any member, or the termination of his membership for any cause whatsoever, all his right and interest in said corporation shall cease, so that neither he nor his heirs, assigns or representatives shall have any interest in or claim upon any of the property of said corporation or its funds or income, whether previously or subsequently acquired, nor be entitled to demand or receive any dividend or distributive share thereof, whether declared or distributed during the existence of said association or upon its dissolution, provided that nothing herein contained shall impair the right of any person ceasing to be a member to hold or enforce against said association any bond or debt incurred by the association upon or for a consideration other than that of membership therein.

8. That petitioners desire for said corporation the power to purchase, rent, lease, receive, hold and own such real and personal property as may be necessary or appropriate for its purposes; the power to

issue such notes, bonds or other evidences of debt as it may desire and to secure the same by mortgage, deed or trust, or other appropriate instrument upon any realty, personalty or other property it may own; and the power to dispose of, sell and convey any or all of its said property at its pleasure.

9. That petitioners desire for said corporation authority to own stock in other corporations and to dispose of same at pleasure, subject to the limitations imposed by the Constitution of Georgia.

10. That petitioners desire for said corporation, in order to effectuate its purposes, the power to receive donations by gift or will.

11. That petitioners desire for said corporation the right to accept amendments to its charter, either in matters of form or of substance, by a majority vote of its directors, and the power, upon majority vote of its directors, to surrender its charter and wind up its affairs at any time that it may desire.

WHEREFORE, petitioners pray that this petition be filed, published and recorded as provided by law, and that an order be passed incorporating them as aforesaid, and your petitioners will ever pray, etc.

Harold Hirsch
Daniel MacDougald
Marion Smith
T. S. Mell
Attorneys for Petitioners.

GEORGIA, CLARKE COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY:

IN RE PETITION FOR CHARTER
UNIVERSITY OF GEORGIA
ATHLETIC ASSOCIATION.

In Open Court on this the 14th day of February, 1928, I hereby certify that I am disqualified to preside upon the petition for Charter of the University of Georgia Athletic Association, because I am a member of said Association.

This the fourteenth day of February 1928.

Blanton Fortson
Judge Superior Court, W. C.

Appointed to Judge Pro Hac Vice by Clerk.

Pursuant to the provisions of Code Section 4856 and 4858 - I, E. J. Crawford, Clerk of the Superior Court of Clarke County, do hereby select Henry C. Tuck, as Judge Pro Hac Vice, to preside over and act upon the petition for Charter of the University of Georgia Athletic Association.

In Open Court this the fourteenth day of February 1928.

E. J. Crawford
Clerk Superior Court,
Clarke County, Georgia.

"GEORGIA, CLARKE COUNTY.

EX PARTE) APPLICATION FOR
) INCORPORATION
) UNIVERSITY OF GEORGIA
) ATHLETIC ASSOCIATION
) CLARK SUPERIOR COURT.

The application of petitioners for incorporation having been filed and published as by law required, and all of the provisions of the statute having been complied with by petitioners, and the application being within the purview and intent of the law;

IT IS THEREUPON ORDERED, CONSIDERED AND ADJUDGED by the Court that petitioners be, and they are hereby incorporated under the name of

UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

for the full period of twenty (20) years, with the right of renewal, and with all other rights, privileges and immunities as prayed for in the petition, and such others as are incident to like corporations.

Let these proceedings be recorded and this order entered upon the Minutes, and the petitioners will pay the costs thereof.

IN OPEN COURT, this the 14th day of February, 1928.

(sgd) Henry C. Tuck,
Judge Pro Hac Vice, Superior Court, Clarke County, Georgia."

Defendant next introduced in evidence "Defendant's Exhibit 4", being a check on the First National Bank of Atlanta, dated November 27, 1934, as follows:

DEFENDANT'S EXHIBIT 4

THE FIRST NATIONAL BANK
PEACHTREE OFFICE – NORTH AVE. NO. 1097
ATLANTA, GEORGIA, November 27, 1934.
Pay to the order of J. D. Osborne 604 Doctors Bldg.
Atlanta, Ga., ... $24.00
GEORGIA TECH ATHLETIC ASSOCIATION
FLOYD FIELD, Treasurer.
A. H. ARMSTRONG, Business Manager.

Endorsed and stamped paid 11–30–34.

* * * * * * * * *

Defendant next introduced in evidence "Defendant's Exhibits 5-A, 5-B and 5-C", being checks of Georgia Tech Athletic Association payable to the Collector of Internal Revenue.

DEFENDANT'S EXHIBIT 5-A

THE FIRST NATIONAL BANK
PEACHTREE OFFICE – No. 10251
ATLANTA, GEORGIA, December 8, 1932
Pay to the order of Collector of Internal Revenue
..... $5,848.80
GEORGIA TECH ATHLETIC ASSOCIATION
FLOYD FIELD, Treasurer
A. H. ARMSTRONG, Business Manager.

Endorsed and stamped paid 12–24–32

DEFENDANT'S EXHIBIT 5-B

THE FIRST NATIONAL BANK
PEACHTREE OFFICE – No. 10225
ATLANTA, GEORGIA, November 29, 1932
Pay to the order of Collector of Internal Revenue
..... $3,880.68
GEORGIA TECH ATHLETIC ASSOCIATION
FLOYD FIELD, Treasurer
A. H. ARMSTRONG, Business Manager.

Endorsed and stamped paid 12–2–32

DEFENDANT'S EXHIBIT 5-C

THE FIRST NATIONAL BANK
PEACHTREE OFFICE – No. 10186
ATLANTA, GEORGIA, November 14, 1932
Pay to the order of Collector of Internal Revenue
..... $1,230.69
GEORGIA TECH ATHLETIC ASSOCIATION
FLOYD FIELD, Treasurer
A. H. ARMSTRONG, Business Manager.

Endorsed and stamped paid 11–22–32.

Defendant next introduced in evidence "Defendant's Exhibits 6-A and 6-B", being specimens of football tickets of the University of Georgia Athletic Association used during the Fall of 1934, as follows:

DEFENDANT'S EXHIBIT 6-A

North Stand Hold Your Own Ticket
MEMORIAL STADIUM - COLUMBUS, GA.
Enter Gate....

GEORGIA vs. AUBURN.
Sec....

SAT. NOV. 24, 1934 at 2 P. M.
Row....

Established price $2.04 Total
Tax .21 $2.25 Seat -2-
(see back of ticket)

On reverse side of ticket is a diagram of field and the following:

*The University of Georgia being an Instrumentality of the Government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury Regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

* * * * * * * * * *

DEFENDANT'S EXHIBIT 6-B

ADMIT ONE
NO. 207 FOOTBALL GEORGIA vs. STETSON
SANFORD STADIUM, SEPT. 29, 1934, 3:30 P. M.
Est'd Price $1.36 Not good on Right Side of
Tax* .14 Aisles 6 and 27.

$1.50

*The University of Georgia, being an Instrumentality of the Government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury Regulations pending a decision as to its liability in this respect This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

Defendant next introduced in evidence "Defendant's Exhibit 7", being a list of the names and players on varsity football team at the University of Georgia during the Fall of 1934, as follows:

DEFENDANT'S EXHIBIT 7

"University of Georgia Football Squad
Year 1934

Green, Maurice	Eatonton, Ga.
Grant, Cy	Atlanta, Ga.
West, John H.	Dawson Springs, Ky.
McCullough, David Cordell	Atlanta, Ga.

Treadway, Chas.	Atlanta, Ga.
Harman, Harry E.	Atlanta, Ga.
Hall	
O'Farrell, Hugh R.	Athens, Ga.
Law, W.	Atlanta, Ga.
Griffith, Jack	Albany, Ga.
Hollis, Howell	Newnan, Ga.
Bond, John	Toccoa, Ga.
McKnight, John	Toccoa, Ga.
Shi, Allan D.	Macon, Ga.
Opper, Chas. G.	Savannah, Ga.
Gunnels, Sandy	Hull, Ga. Rt. No. 2
Ashford, Alec	Athens, Ga.
Jones, Johnny	Atlanta, Ga.
Wagnon, Henry S.	Bostwick, Ga.
Candler	
Turbyville, Chas.	Chattanooga, Tenn.
Law, B.	Atlanta, Ga.
Chapman, Geo. A.	Winder, Ga.
Anderson, Alf	Decatur, Ga.
Minor, Alfred W.	Collingswood, N. J.
Causey	
Earle	
Morgan	
Brown, John C.	Athens, Ga.
Perkinson	Atlanta, Ga.
O'Malley	Savannah, Ga.
Cavan	
Johnson, Glenn	Savannah, Ga.
Chapman, Buck	

"

Defendant introduced in evidence "Defendant's Exhibit 8", being a certified copy of the claim for re-

fund filed by Georgia Tech Athletic Association, to which is attached a letter dated October 11, 1933, from the Commissioner of Internal Revenue addressed to Georgia Tech Athletic Association, bearing the official stamp of the Commissioner's office with the action taken endorsed on the reverse side, which is incorporated elsewhere in the record as "Plaintiff's Exhibits 10 and 11", appearing on pages 320 and 324, except endorsements thereon in the Bureau of Internal Revenue, as follows:

DEFENDANT'S EXHIBIT 8

"CERTIFICATES

NO PREVIOUS CLAIM

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

729 Schedule No.

Name of Taxpayer	Character of assessment and period covered	List.	Year.	Month.	Page.	Line.	Amount.	Date Paid.	District in which paid.
	Tax Admission								
Georgia Tech	Oct. 1932	ST	1932	Dec.	1500	4	$5,111.37	12-1-32	Georgia
Athletic	Nov. 1932	"	1932*	Dec.	1503	6	5,848.80	12-22-32	"
Association									
North Ave.,	Jan. 1933	"	1933	Mar.	1502	2	158.33	3-7-33	"
Atlanta, Ga.	Feb. 1933	"	1933	Mar.	1500	9	63.12	3-2-33	"
	TOTAL						$11,181.62		

W. E. Page,
Collector of Internal Revenue

*Period not given

.....
Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

JCE 7-26-36 Claim No. ST8963

Claim No. ST8963

To whom sold issued	Kind.	Number.	Denomination.	Date of sale or issue	If special tax stamp, state: Amount	Serial number.	Period commencing

ENTERED

REFUND B

.....
Collector..... District Georgia

Schedule Number ST-REJ 3234 Oct 30 1933 District Ga.....
Adm.
Allowed or Rejected Number..... (Nature of Tax)

Claimant Georgia Tech Athletic Assn.

Address Atlanta, Ga.

Examined and submitted for action....., 19.....

Schedule No.....
Claim examined by—
WJR
Claim approved by –
M. E. Hay
Acting Chief of Division

COMMITTEE ON CLAIMS
Amount Claimed – $11,181.62
WED Amount allowed – $.....
Amount re- $11,181.62
jected –

2-11704

BLANK

PAGE

Defendant next offered in evidence "Defendant's Exhibit 9", as follows:

DEFENDANT'S EXHIBIT 9

Treasury Department
Internal Revenue Service
Form approved by Comptroller General U. S.
October 31, 1931.

COMMISSIONER'S TELEGRAPHIC ASSESSMENT LIST

Treasury Department
Bureau of Internal Revenue
Washington
Miscellaneous Unit
Sales Tax Div. A. & C. Sec 3:30 P. M.
(unit, division and section, time written)
Charge: Treasury Department, Appropriation for Collecting Internal Revenue"

T E L E G R A M
OFFICIAL BUSINESS—GOVERNMENT RATES
October 22 1934
October 1934 2nd Supplemental
COLLECTOR OF INTERNAL REVENUE
ATLANTA GEORGIA

JOINT ASSESSMENTS ARE HEREBY MADE AND CERTIFIED TO YOU AS FOLLOWS

GEORGIA TECH ATHLETIC ASSOCIATION
GEORGIA TECH ATHLETIC ASSOCIATION IN-

CORPORATED BOARD OF CONTROL GEORGIA TECH ATHLETIC ASSOCIATION DOCTOR M L BRITTAIN DOCTOR W V SKILES DOCTOR J B CRENSHAW DOCTOR GILBERT BOGGS PROFESSOR FLOYD FIELD DOCTOR A H ARMSTRONG GEORGE W MCCARTY ROBERT T JONES JUNIOR JACK PHILILPS D KALKHURST W N GLENN ALL OF ATLANTA GEORGIA TAX ON ADMISSIONS THREE THOUSAND NINE HUNDRED FOURTEEN DOLLARS SIXTY THREE CENTS PERIOD SEPTEMBER AND OCTOBER NINETEEN HUNDRED THIRTY FOUR

CHARLES E MARTIN TRUSTEE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION UNIVERSITY OF GEORGIA DEPARTMENT OF ATHLETICS ALL OF ATHENS GEORGIA TAX ON ADMISSIONS EIGHT HUNDRED NINETY FIVE DOLLARS THIRTY SEVEN CENTS PERIOD SEPTEMBER AND OCTOBER NINETEEN HUNDRED THIRTY FOUR

ISSUE NOTICE AND MAKE DEMAND FOR IMMEDIATE PAYMENT AND IF PAYMENT IS NOT MADE IMMEDIATELY FILE NOTICE OF LIEN

(sgd) GUY T HELVERING
Commissioner of Internal Revenue.

Defendant introduced in evidence "Defendant's Exhibit 10", being a copy of return for tax on admissions for October, 1932, filed by the Georgia Tech Athletic Association, as follows:

DEFENDANT'S EXHIBIT 10

"TAX ON ADMISSIONS, DUES, AND SAFE DEPOSIT BOXES

Oct. 1932 388068

Character of Tax	Amount of Tax
(a) Admissions to any place, if in excess of 40 cents	$4 895 77
(b) Free or reduced-rate admissions	215 60

* * *

(g) Club dues $1,230.69 was paid 11-21-32
(h) Club initiation fees Transferred from Unid. Acc't

* * *

Dec-1932 S T List 12-1-32.
Name Georgia Tech Athletic Association.
No. and Street
City and State Atlanta, Georgia

1500 4 2-14703

828

	Amount of Tax
Total liability	$5 111 37

* * *

Total amount due	5 111 37

I swear (or affirm) that the foregoing is a true return of the amount of tax due on admissions or dues for the month of....., 193 , and that the amount of the credit deducted is correct and allowable by law. Signed Floyd Field, Treas.

* * *

Sworn to and subscribed before me this 29th day of November 1932

Florence England (Name) or (Witness) (See paragraph 5 of instructions) Notary Public (Title) or (Witness)

Collector Int. Rev.
Received
(STAMPED) Nov 30 1932
Dist. of Georgia

Internal Revenue
Paid
(STAMPED) Dec 1 1932
Dist of Ga.
J. T. Rose, Collector

Defendant introduced in evidence "Defendant's Exhibit 11", being a copy of a return for tax on admissions for November, 1932, filed by the Georgia Tech Athletic Association, as follows:

DEFENDANT'S EXHIBIT 11

"TAX ON ADMISSIONS, DUES, AND SAFE DEPOSIT BOXES
L-584880

Character of Tax	Amount of Tax
(a) Admission to any place, if in excess of 40 cents	$5 848 80

* * *

Name Georgia Tech Athletic Association
No. and Street
City and State Atlanta, Georgia.

1503 6 2-14703

* * *

Nov - 1932	Amount of Tax
Total liability	$5 848 80

* * *

Net tax due 5 848 80

* * *

Total amount due 5 848 80

I swear (or affirm) that the foregoing is a true return of the tax due on admissions or dues for the month of November 1932 and that the amount of the credit deducted is correct and allowable by law.

Signed Floyd Field, Treas.

* * *

Sworn to and subscribed before me this 21st day of December 1932

E. E. Allen, Notary Public "

Rec'd with remittance
Dec
21
(STAMPED) 1935
Coll. Int. Rev. Dist. of

Internal Revenue
PAID
(STAMPED) Dec 23 1932
Dist. of Ga.
J. T. Rose, Collector "

Defendant introduced n evidence "Defendant's Exhibits 12, 13 and 14, being copies of returns prepared by the Collector of Internal Revenue, as follows:

DEFENDANT'S EXHIBITS 12, 13 and 14

Ex. 12

TAX ON ADMISSIONS, DUES, AND SAFE DEPOSIT BOXES

Character of Tax — Amount of Tax

(a) Admission to any place, if in excess of 40 cents ..... $ 159 88

* * *

Name Charles E. Martin, Trustee
University of Georgia Athletic Assn., Department of Athletics, University of Georgia.

No. and Street

City and State Athens, Georgia

2-14703

* * *

Amount of Tax

Total liability ..... $ 159 88

* * *

Total amount due 159 88

I swear (or affirm) that the foregoing is a true return of the amount of tax due on admissions or dues for the month of September 1934, and that the amount of credit deducted is correct and allowable by law.

This return prepared under the provisions of Sec. 3176 R. S.

Signed Paul Cobb Dep. Col

* * *

Sworn to and subscribed before me this 19th day of October 1934

Ruth S. Mooney (Name) or (Witness) (See paragraph 5 of instructions) Dep. Col. (Title) or (Witness)

* * *

EX. 13

TAX ON ADMISSIONS, DUES, AND SAFE DEPOSIT BOXES

Character of Tax — Amount of Tax

(a) Admission to any place, if in excess of 40 cents ..... $ 735 49

* * *

Name Charles E. Martin, Trustee
University of Georgia Athletic Assn., Department of Athletics, University of Georgia.

No. and Street

City and State Athens, Georgia

2-14703

* * *

	Amount of Tax
Total liability	$ 735 49

* * *

Total amount due	735 49

I swear (or affirm) that the foregoing is a true return of the amount of tax due on admissions or dues for the month of October 1934, and that the amount of credit deducted is correct and allowable by law. This return prepared under the provisions of Sec. 3176 R. S.

Signed Paul Cobb Dep. Col

* * *

Sworn to and subscribed before me this 19th day of October 1934

Ruth S. Mooney (Name) or (Witness) (See paragraph 5 of instructions) Dep. Col. (Title) or (Witness)

* * *

Ex. 14

TAX ON ADMISSIONS, DUES, AND SAFE DEPOSIT BOXES

Character of Tax	Amount of Tax
(a) Admissions to any place, if in excess of 40 cents	$3 914 63

* * *

Name Georgia Tech Athletic Association

No and Street

City and State Atlanta, Ga.

2-14703

* * *

Oct 1934 List Pg 500 L O

	Amount of Tax
Total liability	$3 914 63

* * *

Total amount due	3 914 63

I swear (or affirm) that the foregoing is a true return of the amount of tax due on admissions or dues for the month of Sept - Oct 1934, and that the amount of the credit deducted is correct and allowable by law.

Signed T. A. Wallace (s) Deputy Collector

(State whether individual owner of business member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Sworn to and subscribed before me this 19 day of Oct, 1934

Sarah Fambro (s) Deputy Collector (Name) or (Witness) (See paragraph 5 of instructions) (Title) or (Witness)

* * * "

Thereupon, the following colloquy took place:

MR. EUSTACE: May it be further stipulated that after the assessment made by the Commissioner of Internal Revenue, as shown by "Defendant's Exhibit 9", with demand for payment of the tax, that the demand was made by the Collector of the University of Georgia Athletic Association and also Georgia Tech Athletic Association for the respective amounts?

MR. SMITH: We sipulate that. W do note stipulate that it was a tax. We stipulate that demand was made with assessment for whatever it was.

MR. EUSTACE: May it further be stipulated that upon failure to pay the amount claimed by the Collector as tax on each of these items the Collector of Internal Revenue filed liens with the Clerk of the District Court of the United States for the Northern District of Georgia, and also with the Clerks of the Superior Courts of the respective Counties, in which the institutions are located?

MR. SMITH: We will stipulate that.

MR. EUSTACE: May it be further stipulated that the Collector issued his warrants of distraint, which were placed in the hands of deputy collectors for service, and that levies under these warrants were made upon bank accounts in the banks carrying the deposit of funds, which were separately set aside by the officers of these Athletic Associations as being the amounts collected representing 10% of the amounts of the admissions?

MR. SMITH: We will stipulate that.

MR. EUSTACE: May it be further stipulated that demand and notice of levy and demand for payment was made upon each of these banks, and that levies were made upon the bank deposits represented by these funds?

MR. SMITH: We so stipulate.

Defendant then introduced in evidence "Defendant's Exhibit 15", being notice of tax lien, as follows:

DEFENDANT'S EXHIBIT 15

NOTICE OF TAX LIEN UNDER INTERNAL REVENUE LAWS

Form 668–Revised Oct. 1928
Treasury Department
Internal Revenue Service
No. M. T. 481 United States Internal Revenue,
.....District of GEORGIA
Atlanta, Georgia October 24, 1934

Pursuant to the provisions of Section 3186 of the Revised Statutes of the United States, as amended by Section 613 of the Revenue Avt of 1928 (Act of May 29, 1928, 45 Stat., 875) notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayers, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest penalties and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of Taxpayer Charles E. Martin, Trustee; Univ. of Ga. Athletic Assn.; and Univ. of Ga. Department of Athletics
Residence or place of business Athens, Georgia
Nature of tax Tax on Admissions
Taxable period September & October, 1934

Amount of tax assessed $895.37
Additional (penalty) tax assessed
Date assessment list received October 24, 1934
(signed) W. E. Page Collector.

(Verification Omitted)

TO Clerk, Superior Court
Clarke County
Athens, Georgia

(on reverse side of notice)

Section 3186, R. S., as amended by Section 613, Revenue Act of 1928 and Section 509, Revenue Act of 1934. "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto), shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

"(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated whenever the State or Territory has by law provided for the filing of such notice; or

"(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

"(3) in the office of the clerk of the Supreme Court of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

"(c) Subject to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the collector of internal revenue charged with an assessment in respect of any tax—

"(1) May issue a certificate of release of the lien if the collector finds that the liability for the amount assessed, together with all interest in respect thereof, has been satisfied or has become unenforceable;

"(2) May issue a certificate of release of the lien if there is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with the requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations;

"(3) May issue a certificate of partial discharge of any part of the property subject to the lien if the collector finds that the fair market value of that part of such property remain-

ing subject to the lien is at least double the amount of the liability remaining unsatisfied in respect of such tax and the amount of all prior liens upon such property.

"(4) May issue a certificate of discharge of any part of the property subject to the lien if there is paid over to the collector in part satisfaction of the liability in respect of such tax an amount determined by the Commissioner, which shall not be less than the value, as determined by him, of the interest of the United States in the part to be so discharged. In determining such value the Commissioner shall give consideration to the fair market value of the part to be so discharged and to such liens thereon as have priority to the lien of the United States."

"(d) A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

"(e) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation provide for the acceptance of a single bond complying both with the requirements of section 272(*j*) of the Revenue Act of 1928 (relating to the extension of time for the payment of a deficiency), or of any similar provisions of any prior law, and the requirements of subsection (*c*) of this section.

"(f) Subsections (*c*), (*d*), and (*e*) of this section shall apply to a lien in respect of any internal-revenue tax, whether or not the lien is imposed by this section."

Defendant next introduced in evidence "Defendant's Exhibit 16", being a copy of warrant for distraint, as follows:

DEFENDANT'S EXHIBIT 16

"WARRANT FOR DISTRAINT

Special Miscellaneous
No. 1133

Balance Forward	Date	Charge	Last Unpaid Credit	Account Balance	Number and remarks
		$895.37		895.37	Oct. 1934 - 2nd Supplemental O - O Tax on Admissions Sept. and Oct. 1934.

Charles E. Martin, Trustee,
University of Georgia Athletic Association
University of Georgia Department of Athletics
Athens, Ga.

To Paul Cobb, Deputy Collector.

WHEREAS, in pursuance of the provisions of the Acts of Congress relating to internal revenue the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; AND WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglects or refuse to pay the same: You

are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or of which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purpose aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixteenth day after the execution hereof.

Unpaid balance $895.37

* * *

Total tax, penalty, and interest due on date of second notice $895.37

* * *

Witness my hand and official seal at Atlanta, Ga. this 24th day of October, 1934

(signed) W. E. Page
Collector of Internal Revenue.
Internal Revenue Collection District of Georgia

RETURN OF DEPUTY COLLECTOR

*I hereby certify that, pursuant to the herein warrant of distraint, I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all provisions of law were strictly complied with; that the property was sold at public acution, after due notice, to the highest bidder at the prices herein stated:

1. Date of receipt of warrant October 24, 1934

2. Description of property levied upon Bank deposit in Citizens & Southern National Bank, Athens, Georgia in name of Charles E. Martin, Trustee.

*I have not executed the within warrant for the following reasons: Form 668-2 served on R. V. Watterson Vice Pres. & Cashier, C. & S. Nat'l Bank., Athens Ga., at 10:45 a. m. E. T. 10/25/34; Form 668-c served on R. V. Watterson personally & as V-P & Cashier, C. & S. Natl'l. Bk., Athens, Ga. at 5:00 p. m. E. T., 10/30/34. Payment not received; Warrant returned for suit.

Dated at Atlanta, Ga. November 5, 1934

(signed) Paul Cobb,
Deputy Collector

Defendant next introduced in evidence "Defendant's Exhibit 17", being notice of levy, as follows:

DEFENDANT'S EXHIBIT 17

NOTICE OF LEVY

United States of America
..... Collection District,
State of Georgia

To Citizens & Southern National Bank
(Name of person holding property, moneys, etc., belonging to taxpayer)
At Athens, Georgia

You are hereby notified that there is now due, owing, and unpaid from Charles E. Martin, Trustee, Athens, Ga. (Insert name of taxpayer) to the United States of America the sum of Eight Hundred Ninety Five and 37/100 dollars ($895.37) (Insert amount of tax, penalties and interest due) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Charles E. Martin, Trustee (Insert name of taxpayer) and all sums of money owing from you to the said Charles E. Martin, Trustee (Insert name of taxpayer) are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Eight Hundred Ninety Five & 37/100 ($895.37) (Insert amount of tax, penalties, and interest) of the amount now owing from you to the said Charles E. Martin, Trustee (Insert name of taxpayer) or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Atlanta, Georgia this 24th day of October, 1934.

(signed) W. E. Page
Collector of Internal Revenue.

Service of the within notice acknowledged, this Oct. 25th, 1934.

CITIZENS & SOUTHERN NATIONAL BANK, ATHENS, GA.

By (signed) R. V. WATTERSON
Vice-President & Cashier.

Atlanta, Georgia
October 25, 1934

I, Paul Cobb, Deputy Collector, hereby certify that the within Notice of Levy was served upon R. V. Watterson, Vice-President and Cashier of the Athens Office of the Citizens & Southern National Bank, at the Banking Office of the Citizens & Southern National Bank, at Athens, Georgia, at 10:45 a. m. E. T. on October 25, 1934. The Bank's records show a balance of $1,119.71 on deposit subject to the Levy.

(signed) Paul Cobb,
Deputy Collector.

Defendant next introduced in evidence "Defendant's Exhibit 18", being notice and demand for tax, as follows:

DEFENDANT'S EXHIBIT 18

NOTICE AND DEMAND FOR TAX
SPECIAL MISCELLANEOUS

Form 17 (Rev. Aug. 1925 ORIGINAL
Treasury Department
Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax, penalty, and interest stated hereon. Demand is hereby made for immediate payment thereof. If payment is not made after date of this notice, the law provides that a penalty of 5 percent of the amount of the assessment will be added, plus additional interest on such assessment at the rate of 1 percent per month until paid.

Date 10-24-34

To avoid further penalty and interest the amount stated on this notice must be paid to Collector of Internal Revenue at Atlanta Ga.

Name and address—Charles E. Martin, Trustee,
University of Georgia Athletic Association.
University of Georgia Department of Athletics,
Athens, Ga.
Oct. 1934 - Second Supplemental - O - O

Items—$895.37

Paid—

Assessment—$895.37

Description—Tax on Admissions September & October 1934 0-5

Return this Form with Remittance 2-13640

Defendant next introduced in evidence "Defendant's Exhibit 19", being second notice and demand for tax, as follows:

DEFENDANT'S EXHIBIT 19

SECOND NOTICE AND DEMAND FOR TAX
SPECIAL MISCELLANEOUS TAX

Date 10-24-34

Demand is hereby made for the payment of the amount stated on this notice. Due to your failure to pay within the prescribed time, a penalty of 5% plus additional interest at the rate of 1% per month beginning on the due date stated below is also demanded. If payment of the tax, penalty and interest is not received within ten days after the above date, collection with costs shall be made by seizure and sale of property.

Due Date 10-24-34

W. E. Page
Collector of Internal Revenue

To avoid seizure and sale of property this tax must be paid within ten days after the date of this notice to the Collector of Internal Revenue at Atlanta, Ga.

To the Collector of Internal Revenue:

I enclose remittance covering tax, penalties, and interest itemized below:

Tax $895.37

* * *

Name .....

Total $895.37

Name and Address—Charles E. Martin, Trustee
University of Georgia Athletic Association,
University of Georgia Department of Athletics,
Athens, Ga.
Oct. 1934 - 2nd Supplemental - O - O

Items—

Amount Due—$895.37

Period Covered—

Reason for Assessment—Tax on Admission September & October 1934

Return this Form with Remittance

Defendant next introduced in evidence "Defendant's Exhibit 20", being notice of tax lien, as follows:

DEFENDANT'S EXHIBIT 20

NOTICE OF TAX LIEN UNDER INTERNAL REVENUE LAWS

Form 668–Revised Oct. 1928
Treasury Department
Internal Revenue Service

No. M. T. 480

United States Internal Revenue,
..... District of Georgia,
Atlanta, Ga., October 24, 1936

Pursuant to the provisions of Section 3186 of the Revised Statutes of the United States, as amended by Section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat. 875), notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit: Board of Control, Ga. Tech Athletic Assn., Ga. Tech Athletic Assn., Ga. Tech Athletic Assn,. Inc., Dr. M. L. Brittain, Dr. W. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Prof. Floyd Field, Dr. A. H. Armstrong, Geo. W. Mc-

Robert T. Jones, Jr., Jack Phillips, D. Kalk-
and W. H. Glenn.

of Tax—Tax on Admissions

e Period—September & October, 1934

t of tax assessed—$3,914.63

onal (penalty) tax assessed—

ssessment list received—October 24, 1934

(signed) W. E. Page,
Collector

cation Omitted)

lerk, U. S. District Court
Athens, Georgia 2-1036

ndant next introduced in evidence "Defendant's
t 21", being a copy of warrant for distraint,
ows:

DEFENDANT'S EXHIBIT 21

WARRANT FOR DISTRAINT
Special Miscellaneous No. 1134

Form 69
Treasury Department
Internal Revenue Service
Revised March, 1933
Date—

Charge—$3,914.63

Unpaid Balance—$3,914.63

Account Number and Remarks—(Oct. 1934 - 2nd Sup 0-1)Tax on Admissions, September & October, 1934

Date of First Notice—10-24-34

Date of Second Notice—

Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Association, Doctor M. L. Brittain, Doctor W. V. Skiles, Doctor J. B. Crenshaw, Doctor Gilbert Boggs, Professor Floyd Field, Doctor A. H. Armstrong, George W. McCarty, Robert T. Jones, Jr. Jack Phillips, D. Kalkhurst, W. H. Glenn,
Atlanta, Georgia.

To W. J. Boswell, Deputy Collector.

WHEREAS, in pursuance of the provisions of the Acts of Congress relating to internal revenue the above named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts, named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; AND WHEREAS, ten days have elapsed since notice was served and demand made upon said person or or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattles, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattles, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Unpaid balance..... $3,914.63
* * *

Total tax, penalty ,and interest due on date of second notice..... $3,914.63
* * *

Witness my hand and official seal at Atlanta, Ga. this 24th day of October, 1934.

(signed) W. E. Page
Collector of Internal Revenue.

Internal Revenue Collection District of Georgia

RETURN OF DEPUTY COLLECTOR

*I hereby certify that, pursuant to the herein warrant of distraint, I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all the provisions of law were strictly complied with; that the property was sold at public auction, after due notice, to the highest bidder at the prices herein stated:

1. Date of receipt of warrant 10/25/34
* * *

3. Description of property levied upon Bank deposit in name of Ga. Tech Athletic Assn. 1934-1935 Tax Account, at North Ave. Branch of First Nat'l Bank of Atlanta.
* * *

*I have not executed the within warrant for the following reasons: Form 668-2 served on R. A. Huie Asst. Cashier & Branch Mgr. First Nat'l Bank at 1:45 p. m. 10/25/34; Form 668-c served on R. A. Huie personally and as Asst. Cashier & Branch Mgr. First Nat'l Bank at 9:15 a. m. 10/31/34. Payment has not been received; Warrant returned for suit.

Dated at Atlanta, Ga. November 5, 1934

(signed) W. J. Boswell
Deputy Collector.

Defendant next introduced in evidence "Defendant's Exhibit 22", being copy of notice of levy, as follows:

DEFENDANT'S EXHIBIT 22

NOTICE OF LEVY ON BANK DEPOSITS

Form 668-A
Treasury Department
Internal Revenue Service
Dec. 1922

United States of America
.....Collection District,
State of Georgia

To First National Bank (Name of person holding property, moneys, etc., belonging to taxpayer)
At Atlanta, Georgia

You are hereby notified that there is due, and owing, and unpaid from Georgia Tech Athletic Assn. 1934-1935 Tax Account (Insert name of taxpayer) to the United States of America the sum of Three Thousand Nine Hundred Fourteen & 63/100 (Insert amount of tax, penalties, and interest due) dollars ($3,914.63) as and for an internal revenue tax.

You are further notified that all property and rights to property now in your possession and belonging to the aforesaid Ga. Tech Athletic Assn. 1934-1935 Tax Account (Insert name of taxpayer) and all sums of of money owing from you to the said Ga. Tech Athletic Assn. 1934-1935 Tax Account (Insert name of taxpayer) are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Three Thousand Nine Hundred Fourteen & 63/100 (Insert amount of tax, penalties, and interest) dollars ($3,914.63) of the amount now owing from you to the said Ga. Tech Athletic Assn. 1934-1935 Tax Acct. or such lesser sum as you may be indebted to (Insert name of taxpayer) him, to be applied in payment of said tax liability.

Dated at Atlanta, Georgia this 25th day of October, 1934.

(signed) W. E. Page,
Collector of Internal Revenue

10/25/34 Service Acknowledged
1:45 p. m. First National Bank of Atlanta
Peachtree & North Ave. Br.

By (signed) R. A. Huie,
Asst. Cashier & Br. Mgr.

Atlanta, Georgia
October 25, 1934

I, W. J. Boswell, Deputy Collector, hereby certify that the within Notice of Levy was served on R. A. Huie, Assistant Cashier and Branch Manager of the Peachtree & North Avenue Branch of the First National Bank of Atlanta, at the Banking Office of the First National Bank of Atlanta, Atlanta, Georgia, at 1:45 p. m., on October 25, 1934. Mr. Huie advised me that the Georgia Tech Athletic Assn. had funds on deposit in excess of the amount of this Levy.

(signed) W. J. Boswell,
Deputy Collector.

Defendant next introduced in evidence "Defendant's Exhibit 23", being notice and demand for tax, as follows:

DEFENDANT'S EXHIBIT 23

NOTICE AND DEMAND FOR TAX
SPECIAL MISCELLANEOUS

Form 17 (Rev. Aug. 1925)
Treasury Department
Internal Revenue Service

ORIGINAL

Notice is hereby given that there has been assessed against you the amount of tax, penalty, and interest stated hereon. Demand is hereby made for immediate payment thereof. If payment is not made date of this notice, the law provides that a penalty of 5 percent of the amount of the assessment will be added, plus additional interest on such assessment at the rate of 1 percent per month until paid.

Date 10-24-34

To avoid further penalty and interest the amount stated on this notice must be paid to Collector of Internal Revenue at Atlanta, Ga.

To the Collector of Internal Revenue

I enclose herewith remittance covering tax, penalties, and interest itemized below:

* * *

Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Association, Doctor M. L. Brittain, Doctor W. V. Skiles, Doctor J. B. Crenshaw, Doctor Gilbert Boggs, Professor Floyd Field, Doctor A. H. Armstrong, George W. McCarty, Robert T. Jones, Jr., Jack Phillips, D. Kalkhurst, W. H. Glenn,
Atlanta, Georgia.

Items—$3,914.63

Assessment—$3,914.63

Description—Tax on Admissions September & October, 1934

Defendant next introduced in evidence "Defendant's Exhibit 24", being second notice and demand for tax, as follows:

DEFENDANT'S EXHIBIT 24

SECOND NOTICE AND DEMAND FOR TAX
SPECIAL MISCELLANEOUS

Treasury Department
Internal Revenue Service
Form 21—Revised Aug. 1925 Date 10-24-34

Demand is hereby made for the payment of the amount stated on this notice. Due to your failure to pay within the prescribed time, a penalty of 5%, plus additional interest at the rate of 1% per month beginning on the due date stated below is also demanded. If payment of the tax, penalty and interest is not received within 10 days after the above date, collection with costs shall be made by seizure and sale of property.

Due date 10-24-34

W. E. Page,
Collector of Internal Revenue.

To avoid seizure and sale of property this tax must be paid within 10 days after the date of this notice to the Collector of Internal Revenue at Atlanta, Ga.

To the Collector of Internal Revenue:

I inclose remittance covering tax, penalties, and interest itemized below:

Tax	$3,914.63
Total	$3,914.63
Under Sec. 3184 R. S.) 5% Penalty on amount assessed) 1% Interest	
Total Due	$3,914.63

* * *

Name and Address—
Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Association, Doctor M. L. Brittain, Doctor W. V. Skiles, Doctor J. B. Crenshaw, Doctor Gilbert Boggs, Professor Floyd Field, Doctor A. H. Armstrong, Goegre W. McCarty, Robert T. Jones, Jr. Jack Phillips, D. Kalkhurst, W. H. Glenn,
Atlanta, Georgia.

Amount Due—$3,914.63

Reason for Assessment—Tax on Admissions Septmeber & October 1934.

Defendant next introduced in evidence "Defendant's Exhibit 25", being record of the Citizens and Southern National Bank of Athens, Georgia, of the account standing in the name of Charles E. Martin, Trustee, showing deposit and withdrawals of funds to that account, as follows:

DEFENDANT'S EXHIBIT 25

Card No. 4740

Chas. E. Martin, Trustee
City
U of Ga

In Account with THE CITIZENS & SOUTHERN BANK, Athens, Ga.

DATE	WITHDRAWN	DEPOSITED	BALANCE
	Balance brought forward		
MAY 8 1934		5203.51	5203.51
JUN 30 1934		13.01	5216.52
SEP 18 1934		17.08	5233.60
SEP 20 1934		16.30	5249.90
SEP 24 1934		9.46	5259.36
	65		
SEP 26 1934		11.44	5270.76
OCT 1 1934		11.44	5282.29
OCT 3 1934		64.40	5346.60
OCT 5 1934		85.82	5432.42
OCT 5 1934	11 52	37.13	5469.55
OCT 8 1934		16.37	5485.92
OCT 10 1934		19.81	5505.73
OCT 12 1934		28.06	5533.79
OCT 15 1934		20.14	5553.93
OCT 16 1934		30.02	5583.95
OCT 17 1934		125.72	5709.67
OCT 17 1934		22.43	5732.10

OCT 17 1934		113.90	5846.00
OCT 18 1934		16.81	5862.81
OCT 18 1934		405.90	6268.71
OCT 23 1934		51.03	6319.74
OCT 24 1934		16.49	6336.23
OCT 25 1934		11.50	6347.73
OCT 26 1934		44.11	6391.84
OCT 28 1934		13.26	6405.10
OCT 29 1934		19.13	6424.23
OCT 31 1934		10.43	6434.66
NOV 1 1934		18.71	6453.37
NOV 2 1934		15.56	6468.93

NOV 5 1934		32.61	6501.54

Defendant next introduced in evidence "Defendant's Exhibit 26", being bank record of the account of Georgia Tech Athletic Association in the First National Bank of Atlanta, as follows:

DEFENDANT'S EXHIBIT 26

Name Acct. No. 18722
GEORGIA TECH ATHLETIC ASSOCIATION
Address
1934-5 Tax Acct

In acc't with the Savings Dept. of the FIRST NATIONAL BANK of Atlanta, Ga.

DATE	WITHDRAWALS	DEPOSITS	BALANCE
OCT 25 '34		3,914.63	3,914.63

NOV 28 '34	3,823.67	7,738.30
	19.42	7,757.72
JAN 15 '35	55.85	7,813.57
JAN 18 '35	15.38	7,829.95
JAN 31 '35	14.17	7,843.12
FEB 5 '35	42.03	7,885.15
FEB 28 '35	10.54	7,895.69
APR 30 '35	73.80	7,969.49
MAY 31 '35	25.90	7,995.39
	78.91	8,074.30
	60.55	8,134.85
	61.00	8,195.85

18722

GEORGIA TECH ATHLETIC ASSOCIATION
Tax Acct

The undersigned agrees to the Rules and Regulations of THE FIRST NATIONAL BANK OF ATLANTA, Atlanta, Ga. with reference to Savings Accounts as set out in the Passbooks issued for Savings Accounts and as set out on reverse side of this Signature Card.

	Signature for Withdrawals
1. Georgia Tech Athletic Association	
2. A. H. Armstrong, Bus. Man. Floyd Field, Treas.	Both

ON REVERSE SIDE OF CARD

To The First National Bank of Atlanta, Atlanta, Ga.:

All moneys now on deposit, or at any time deposited by us, or either of us, with The First National Bank of Atlanta, Atlanta, Ga. to the credit of the above account, are and shall be deposited by us and received by said Bank, upon the following terms and conditions of repayment, viz:

That the amount thereof and all interest thereon, shall be paid by The First National Bank of Atlanta, Atlanta, Ga. to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, or upon the written order of any person so entitled to payment; and without reference to the original ownership of the moneys deposited.

Each of the undersigned appoints the other his attorney with power to deposit in this account monies of the other and for that purpose to endorse and check, draft, note or other instrument payable to the other or to said joint depositers.

Defendant next introduced in evidence "Defendant's Exhibit 27", being the bank record of the Georgia Tech Athletic Association tax account in the First National Bank of Atlanta, as follows:

DEFENDANT'S EXHIBIT 27

Name Name — Account No. 16853
Ga. Tech Athletic Asso.
Address Tax Account

In acc't with the Savings Dept. of the FIRST NATIONAL BANK of Atlanta, Ga.

DATE	WITHDRAWALS	DEPOSITS	BALANCE
OCT 31 '33		2,699.41	2,699.41
NOV 18 '33		3,829.26	6,528.67
		23.06	6,551.73
DEC 30 '33		9,050.46	15,602.19
		201.27	15,803.46
		170.53	15,973.99
		121.00	16,254.72
		121.90	16,376.62

16853 1 Ga Tech Athletic Asso.
2 Tax Account

The undersigned agrees to the Rules and Regulations of THE FIRST NATIONAL BANK OF ATLANTA, Atlanta, Ga. with reference to Savings Accounts as set out in the Passbooks issued for Savings Accounts and as set out on reverse side of this Signature Card.

Signatures
1. FLOYD FIELD, Treas. For
2. A. H. ARMSTRONG, Bus. Man. Withdrawlas

Both Signatures Required Both

ON REVERSE SIDE OF CARD

To The First National Bank of Atlanta, Atlanta, Ga.:

All moneys now on deposit, or at any time deposited by us, or either of us, with The First National Bank of Atlanta, Atlanta, Ga. to the credit of the above ac-

count, are and shall be so deposited by us and received by said Bank, upon the following terms and conditions of repayment, viz:

That the amount thereof and all interest thereon, shall be paid by The First National Bank of Atlanta, Atlanta, Ga. to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, or upon the written order of any person so entitled to payment; and without reference to the original ownership of the moneys deposited.

In the case of the death of either or both of us, further repayment shall at the option of The First National Bank of Atlanta, Atlanta, Ga. be conditioned upon the production of evidence that all the inheritance and estate taxes—if any be due—have been paid and that all other provisions of Law in such cases provided have been fulfilled.

Defendant next introduced in evidence "Defendant's Exhibits 28, 29, and 30", being forms of checks, as follows:

DEFENDANT'S EXHIBIT 28

ATHLETIC ASSOCIATION
REQ. No. 1063
UNIVERSITY OF GEORGIA
ATHENS, GA. Sept. 1, 1934
Pay to the order of Fred Hamilton $4.92
Four & 92/100 DOLLARS.
For Fgt. CHAS. E. MARTIN, Agent.

To NATIONAL BANK OF ATHENS,
64-66 ATHENS, GA.
6

Endorsed and stamped paid 9-5-34.

DEFENDANT'S EXHIBIT 29

Req. No. 2324 ATHLETIC ASSOCIATION, No. 443
UNIVERSITY OF GEORGIA,
ATHENS, GA.
ATLANTA, GA., Sept. 4, 1934.
Pay to the order of Western Union Tel. Co. $7.50
Seven & 50/100 Dollars.
To TRUST COMPANY OF GEORGIA,
64-10 ATLANTA, GA.
ATHLETIC ASSOCIATION,
UNIVERSITY OF GEORGIA,
CHAS E. MARTIN,
Secretary-Treasurer.

Endorsed and stamped paid 9-5-34.

DEFENDANT'S EXHIBIT 30

Req. No..... No. 628
DEPARTMENT OF ATHLETICS
UNIVERSITY OF GEORGIA, ATHENS, GA.
ATLANTA, GA. Oct. 31, 1934
Pay to the order of SEABOARD RAILROAD $474.10
B'Ham DEPARTMENT OF ATHLETICS,
UNIVERSITY OF GEORGIA,

383
387

To TRUST COMPANY OF GEORGIA
64-10 ATLANTA, GA.

CHAS. E. MARTIN,
Secretary-Treasurer.

Endorsed and stamped paid 11-2-34.

Thereupon defendant rested its case.

Thereupon, defendant, at the close of all of the evidence, and after both sides had rested, filed his written Motion to Dismiss the Bill of Complaint on each ground therein stated, and the same was filed and made a part of the record.

Thereupon, defendant filed its written request for Special Findings of Fact and Conclusions of Law, and the same was filed and made a part of the record.

On behalf of complainant, counsel submitted a form of order on the Motion to Dismiss filed by the defendant, which was signed by the Court and filed.

Thereupon, complainant submitted requests for Findings of Law and Fact, which was filed and made a part of the record.

After argument by counsel for the respective parties the Court requested respective counsel to submit briefs within a reasonable length of time. Thereupon the Court took the case under advisement.

The above and foregoing is all of the evidence introduced in the trial of said cause, and all proceedings had in the trial thereof.

WHEREFORE, defendant and appellant prays that the above statement of evidence be settled, approved, and allowed, by the above entitled Court as a true, full, and correct and complete statement of all the evidence, oral and documentary, taken and given on the trial of said cause for use on the appeal taken to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated 3rd day of April, 1937.

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

Solicitors for Defendant.

Service of the foregoing statement of evidence and receipt of copy thereof is hereby admitted and acknowledged this 3rd day of April, 1937.

M. J. YEOMANS,
Atty. Genl. State of Ga.

HAROLD HIRSCH,
MARION SMITH,
M. E. KILPATRICK,
Solicitors for Complainant.

Lodged in Clerk's office
under Equity Rule 75
April 3rd, 1937.

TITLE OMITTED.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement of evidence is hereby allowed and approved, Appellee, through its counsel, having agreed that same is full and complete, and it so appearing to the Court, and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above styled case, as provided in Equity Rule 75.

This the 14th day of April, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed April 14, 1937.

TITLE OMITTED.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now W. E. Page, Collector of Internal Revenue, the above named defendant, by Lawrence S. Camp, United States Attorney for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his solicitors of record, feeling himself aggrieved by the final decree of this Court entered herein on the 14th day of January, 1937, in favor of the complainant and against the defendant, does hereby appeal therefrom, and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal be allowed, that a citation be issued directed to the above named complainant, commanding it to appear before the United States Circuit Court of Appeals for the Fifth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of record, proceedings, and papers, upon which said decree was made, be duly authenticated and sent to the Circuit Court of Appeals for the Fifth Circuit, in accordance with law and its rules, in order that the errors com-

plained of may be considered and corrected.

April 3, 1937.

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney.

Filed April 3, 1937.

TITLE OMITTED.

ORDER ALLOWING APPEAL

The petition of defendant herein praying an appeal from the final decree heretofore entered in this Court, permanently enjoining the defendant from further proceedings under levies and warrants for distraint referred to in the Bill of Complaint and cancelling levies, warrants for distraint, and liens, likewise referred to in the Bill of Complaint, being presented,

IT IS HEREBY ORDERED that an appeal be allowed to the United States Circuit Court of Appeals for the Fifth Circuit as prayed for, and that a transcript of such part of the record herein as the parties herein by praecipe duly designate be transmitted duly authenticated to said United States Circuit Court of Appeals for the Fifth Circuit in the manner provided by law.

IT IS FURTHER ORDERED that citation to the complainant be issued in regular course.

IT IS FURTHER ORDERED that no bond for costs be required of defendant on said appeal, this being an appeal brought up by the Treasury Department, a Department of the Government of the United States of America, and by direction of the Attorney General thereof.

Dated this 3rd day of April, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed April 3, 1937.

TITLE OMITTED.

ASSIGNMENTS OF ERROR

Comes now W. E. Page, Collector of Internal Revenue, the above named defendant, by Lawrence S. Camp, United States Attorney for the Northern District of Georgia, and M. Neil Andrews, Assistant United States Attorney for said District, his solicitors of record, and respectfully submits the following Assignments of Error upon which he relies in support of his appeal from the judgment and decree entered on the 14th day of January, 1937, in said cause, in the District Court of the United States for the Northern District of Georgia, and under which Assignments of Error said defendant, as ap-

pellant, seeks reversal of the decision, judgment, and decree of said Court;

I. The Court erred in refusing to sustain defendant's motion to dismiss the bill of complaint and the amendments thereto upon each of the specific grounds therein specifically stated, which motion was made after the close of all the evidence and after both sides had rested, for the reason that the pleadings and the evidence, with every inference of fact that may fairly be drawn therefrom, are sufficient to sustain said motion to dismiss on each of said specific grounds, separately and collectively; and for the further reason that the record contains no sufficient nor substantial evidence to sustain a decree in favor of the complainant and against the defendant, but the undisputed evidence introduced by the defendant is sufficient in law to sustain a decree in favor of the defendant.

II. The Court erred in refusing to specifically or generally find the facts set forth in each of defendant's requested special findings numbered one to twenty-three,, inclusive, in that the evidence conclusively establishes each of such requested findings and the record contains no sufficient nor substantial evidence to sustain any finding to the contrary and against the defendant.

III. The Court erred in refusing to specifically or generally find the facts set forth in defendant's requested special findings numbered VII and XI, each being identical except that VII refers to the Univer-

sity of Georgia and the University of Georgia Athletic Association, and XI refers to the School of Technology and the Georgia Tech Athletic Association, and to find that—

> During the months of September and October, 1934, athletic games and contests were held or played in and upon an athletic field or stadium situated upon the grounds or campus of said University of Georgia, and the general public was admitted as spectators upon the payment of admission charges usually evidenced by tickets, which admission charges were collected and said tickets were sold by said University of Georgia Athletic Association, acting through one Charles E. Martin. During said months of September and October, 1934, such games or contests were held in said stadium, and the funds derived from the collection of admissions or from the sale of tickets to such games and athletic events were collected and held by said University of Georgia Athletic Association to spectators and used by them in gaining admission to said stadium to witness said games or contests had printed on the front or face thereof the words "Est'd Price ....." (with the amount stated in accordance with the location of the seat to be occupied by the spectator), "Tax....." (with the percentage of the admission price due as tax stated, and "Total....." (being the total of Admission and Tax). Printed or stamped on the front of such tickets, there appeared the following statement:
>
> The University of Ga., being an instrumentality of the government of the State of Ga., contends that it is not liable for any admission tax. The amount collected as a tax, as

shown on the face of this ticket, will therefore, be retained by the University as part of the admission unless it is finally determined that the University is liable for the tax.

Upon each of said tickets so sold and for each admission so sold said University of Georgia Athletic Association collected from the purchasers of such tickets or admissions, in addition to the admission price, an amount equal to ten per cent of said admission price as and for the admission tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, being the amount designated on said tickets as "Government Tax."

And the same with respect to the School of Technology and the Georgia Tech Athletic Association, except the name "School of Technology", "Georgia School of Technology", "Georgia Tech Athletic Association", and A. H. Armstrong" are inserted in lieu of the names: "University of Georgia", University of Georgia Athletic Association" and "Charles E. Martin", in that the undisputed evidence shows such facts and particularly that during September and October, 1934, athletic games were held or played upon the athletic fields at both the University of Georgia and the School of Technology, and that the general public was admitted to such games upon the payment of the admission charges; that tickets of admission were sold and the proceeds thereof were collected by the University of Georgia Athletic Association and by the Georgia Tech Athletic Association, respectively, and the funds derived

from such ticket sales were collected and held by such athletic associations, respectively; and that the federal tax imposed by law was collected by the respective athletic associations from each purchaser of tickets in addition to the admission price; and the record contains no sufficient nor substantial evidence to sustain findings to the contrary and against the defendant.

IV. The Court erred in refusing to specifically or generally find the facts set forth in defendant's requested special findings numbered IX and XIII, and to find that—

> IX. Upon the failure of said University of Georgia Athletic Association or the said Charles E. Martin to make the returns and pay the tax on said admissions, the defendant as collector of Internal Revenue made returns for said University of Georgia Athletic Association of admissions tax due and owing by it for said months of September and October, 1934, showing admissions taxes due and owing thereon, amounting to $895.37, and an assessment in said amount was thereafter duly made by the Commissioner of Internal Revenue against Charles E. Martin, Trustee, University of Georgia Athletic Assn., University of Georgia Department of Athletics, all of Athens, Georgia.
>
> XIII. Upon the failure of said Georgia Tech Athletic Association or the said Dr. A. H. Armstrong to make the returns and pay the tax on said admissions, the defendant as Collector of Internal Revenue made returns for said Georgia Tech Athletic Association of admissions tax due and owing by it for said months of Sep-

tember and October, 1934, showing admission taxes due and owing thereon amounting to $3,914.63, and assessment of said amount was thereafter made by the Commissioner of Internal Revenue against Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), all of Atlanta, Georgia.

in that the uncontradicted and conclusive evidence shows such facts and particularly that the admissions tax on admissions to games held at the University of Georgia and at the School of Technology, respectively, were collected by the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, and not by complainant, and under the law and the evidence said Athletic Associations, respectively, were charged with the duty of making returns and paying the tax; that the defendant, as Collector of Internal Revenue, made the returns for said Athletic Associations, showing the amount due and owing by them respectively to be $895.37 and $3,914.63, respectively; and that assessments in said respective amounts were thereafter duly made by the Commissioner of Internal Revenue against Charles E. Martin, Trustee, University of Georgia Athletic Association, University of Georgia, Department of Athletics, all of Athens, Georgia, in said amount of $895.37; and against Georgia Tech Athletic Associa-

tion, and Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Prof. Floyd Field, Dr. A. H. Armstrong, Mr. Geo. W. McCarty, Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst and Mr. Glenn (W. H.), all of Atlanta, Georgia, in said amount of $3,914.63; in that the record contains no sufficient nor substantial evidence to sustain findings to the contrary and against defendant.

V. The Court erred in refusing to specifically or generally find the facts set forth in defendant's requested special findings numbered X and XIV, and to find that—

> X. Upon the assessment of said tax, the defendant as Collector of Internal Revenue demanded payment of the same of the said Charles E. Martin, Trustee, University of Georgia Athletic Assn., University of Georgia, Department of Athletics, and each of them, but said parties and each of them neglected and refused and still neglects and refuses to pay the same or any part thereof, and said tax and the whole thereof remains unpaid.
>
> XIV. Upon the assessment of said tax as aforesaid, the defendant as Collector of Internal Revenue demanded payment of said tax of the said Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Prof. Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty, Mr.

Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), and each of them, but said parties and each of them neglected and refused and still neglect and refuse to pay the same or any part thereof, and said tax and the whole thereof remains unpaid.

in that the undisputed and conclusive evidence shows such facts and particularly that upon assessment of the tax involved the defendant, as Collector of Internal Revenue, made demand for payment of said respective amounts from each of the respective parties named in the assessment, but that payment was refused by each of said parties respectively, and the whole of said tax remains unpaid, and the records contain no sufficient nor substantial evidence to sustain findings to the contrary and against the defendant.

VI. The Court erred in refusing to specifically or generally find the facts set forth in defendant's requested special findings numbered XV, XVI, XVII, XIX, XXI, XXII, and XXIII, and to find that—

XV. During the months of September and October, 1934, the total admission charges collected, exclusive of Federal taxes to athletic games and contests, by said University of Georgia Athletic Association was not less than $8,953.70.

XVI. During the months of September and October, 1934, the total admission charges collected, exclusive of Federal taxes to athletic games and contests, by said Georgia Tech Athletic Association was not less than $39,146.30.

XVII. On or about October 24, 1934, and subsequent to the assessment of the taxes due the United States by said University of Georgia Athletic Association for said months of September and October, 1934, said defendant, as Collector of Internal Revenue, duly filed for record in the office of the Clerk of the District Court of the United States for the Northern District of Georgia, and also in the office of the Recorder of Clarke County, Georgia, a notice of tax lien on all the property of said University of Georgia Athletic Association as authorized by Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928.

XIX. On October 25, 1934, and subsequent to the assessment of the taxes due the United States by said Georgia Tech Athletic Association for said months of September and October, 1934, said defendant as Collector of Internal Revenue duly filed for record in the office of the Clerk of District Court of the United States for the Northern District of Georgia and also in the office of the Recorder of Fulton County, Georgia, a notice of tax lien on all the property of said Georgia Tech Athletic Association as authorized by Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928.

XXI. On or about November 30, 1932, there was filed in the office of the Collector of Internal Revenue for the Collection District of Georgia on Treasury form 729 by Georgia Tech Athletic Association, verified by Floyd Field, Treasurer, a return of admissions taxes for the month of October, 1932, on account of admissions to athletic events held at the School of Technology

during said month, amounting to $5,111.37, and said Georgia Tech Athletic Association paid said tax on December 1, 1932.

XXII. On or about December 21, 1932, there was filed in the office of the Collector of Internal Revenue for the Collection District of Georgia on Treasury Form 729 by Georgia Tech Athletic Association, verified by Floyd Field, Treasurer, a return of admissions taxes for the month of November, 1932, on account of admissions to athletic events held at the School of Technology during said month, amounting to $5,848.80, and said Georgia Tech Athletic Association paid said tax on December 23, 1932.

XXIII. Thereafter and on or about July 11, 1933, said Georgia Tech Athletic Association filed with the Commissioner of Internal Revenue a claim for refund of $11,181.62 for admissions taxes for the months of October and November, 1932, and January and February, 1933, upon the ground that the Georgia Tech Athletic Association is an instrumentality of a political subdivision of the State of Georgia and exempt from the imposition of the Federal admissions tax. Said claim for refund was thereafter rejected by the Commissioner of Internal Revenue, of which rejection the said Georgia Tech Athletic Association was advised by letter dated October 11, 1933. Said claim for refund was rejected upon the ground that said admissions were not exempt from taxation by reason of the provisions of subdivision (e) of Section 500 of the Revenue Act 1926, which was added by Section 711 (c) of the Revenue Act of 1932.

in that the conclusive and uncontradicted evidence

establishes such facts; and the record contains no sufficient nor substantial evidence to sustain findings to the contrary and against the defendant.

VII. The Court erred in refusing to make defendant's requested conclusion of law numbered II, and to conclude:

> That the plaintiff has failed to sustain the burden of proving a cause for equitable relief in its favor against the defendant.

in that the record contains no sufficient nor substantial evidence to sustain a decree for a permanent injunction or a decree for a declaratory judgment against the defendant.

VIII. The Court erred in refusing to make defendant's requested conclusion of law numbered III, and to conclude:

> That the pleadings and the evidence in this case are insufficient in law to sustain a judgment and decree in favor of the plaintiff and against the defendant.

in that the record contains no sufficient nor substantial evidence to sustain a decree in favor of complainant and against the defendant, but the undisputed evidence introduced by the defendant is sufficient in law to sustain a decree in favor of the defendant.

IX. The Court erred in refusing to make defendant's requested conclusion of law numbered IV, and to conclude:

That under the law and the evidence the University of Georgia Athletic Association, its officers, agents, and employees, and the Georgia Tech Athletic Association, its officers, agents, and employees have collected for the United States of America admission taxes upon athletic games and events held during the months of September and October, 1934, in the respective amounts of $895.37 and $3,914.63, on account of taxes imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, which said respective amounts are special funds in trust for the United States, pursuant to the provisions of Section 607 of the Revenue Act of 1934.

in that the undisputed evidence conclusively establishes the facts therein stated, and that such facts are within the purview of Section 607 of the Revenue Act of 1934.

X. The Court erred in refusing to make defendant's requested conclusion of law numbered V, and to conclude:

That under the law and the evidence the taxes involved in this proceeding were lawfully assessed by the Commissioner of Internal Revenue against the University of Georgia Athletic Association, Charles E. Martin, Trustee, University of Georgia Department of Athletics, and against Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control, Georgia Tech Athletic Assn., Dr. M. L. Brittain, Dr. M. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, Mr. George W. McCarty,

Mr. Robert T. Jones, Jr., Mr. Jack Phillips, Mr. D. Kalkhurst, and Mr. Glenn (W. H.), respectively, and each of them.

in that the undisputed evidence conclusively establishes the facts therein stated, and that such facts are within the purview of Title V of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, Section 3176 of the Revised Statutes, as amended by Section 619 (d) of the Revenue Act of 1928, and Section 3182 of the Revised Statutes.

XI. The Court erred in refusing to make defendant's requested conclusion of law numbered VI. and to conclude:

> That under the law and the evidence the admissions to the athletic games or contests held or played at the University of Georgia and at the School of Technology during the months of September and October, 1934, to which the public was admitted upon the payment of an admission charge and participated in by students in attendance at said University and at said School of Technology, respectively, were subject to the tax imposed by Section 500 of the Revenue of 1926, as amended by Section 711 of the Revenue Act of 1932.

in that the pleadings and the evidence with every inference of fact that may be fairly drawn therefrom, are sufficient to sustain a decision and decree against the complainant and in favor of the defendant, and the record contains no sufficient nor sub-

stantial evidence to sustain a decision and decree to the contrary.

XII. The Court erred in refusing to make defendant's requested conclusion of law numbered VII. and to conclude:

> That under the law and the evidence the tax imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, is not a direct tax but is a tax on admissions which is paid by the purchaser.

in that the pleadings and the evidence with every inference of fact that may be fairly drawn therefrom, are sufficient to sustain a decision and decree against the complainant and in favor of the defendant, and the record contains no sufficient nor substantial evidence to sustain a decision and decree to the contrary.

XIII. The Court erred in refusing to make defendant's requested conclusion of law numbered VIII. and to conclude:

> That under the law and the evidence, if the State of Georgia or complainant has any interest in the funds derived from proceeds of admissions charged and collected from spectators admitted to athletic games or contests held or played at the University of Georgia or at the School of Technology and participated in by students in attendance at said University or at said School of Technology in competition with students in attendance at other colleges and universities; and if the State of Georgia or com-

plainant is engaged in carrying on said intercollegiate contests and charging admissions thereto, it or they to that extent are acting as a private corporate individual engaged in a commercial enterprise.

in that the evidence conclusively shows that the amounts collected as tax on admissions to athletic contests carried on by the University of Georgia Athletic Association and the Georgia Tech Athletic Association were collected from purchasers of such admissions for the United States as and for the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and would not have been so collected had it not been for the provisions of such statute, and, further, that the conducting of athletic contests and charging admissions thereto on the scale and for the purpose and for the revenue shown by the evidence is not primarily an educational undertaking or an undertaking of the State essential to the execution of any of its governmental functions.

XIV. The Court erred in refusing to make defendant's requested conclusion of law numbered IX. and to conclude:

That under the law and the evidence neither the State of Georgia, the Regents of the University System of Georgia, the University of Georgia, the University of Georgia Athletic Association, the School of Technology, nor the Georgia Tech Athletic Association has any right, title, or interest whatsoever in or to any part of that part of the proceeds of admissions to athletic contests and games, collected during

> the months of September and October, 1934, from spectators as a Federal tax by the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, upon the admissions to such games held or played at said University or at said School of Technology.

in that the evidence conclusively shows that the amounts collected as tax on admissions to athletic contests carried on by the University of Georgia Athletic Association and the Georgia Tech Athletic Association were collected from purchasers of such admissions for the United States as and for the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and would not have been so collected had it not been for the provisions of such statute, and that such tax would not have been collected had it not been for the provisions of the statute, and that the proceeds of such collections have been kept separate from any funds belonging to complainant or belonging to either of the athletic associations.

XV. The Court erred in refusing to make defendant's requested conclusion of law numbered X. and to conclude:

> That the complainant is not a department of the State government of Georgia.

in that the record contains no sufficient nor substantial evidence to sustain the averments to the contrary contained in the bill of complaint, nor has complainant sustained the burden of proving such

verments, but on the contrary the evidence conclu-
vely shows that complainant is not a department
f the state government of Georgia.

XVI. The Court erred in refusing to make de-
endent's requested conclusion of law numbered
I.and to conclude:

> That neither the complainant, the University of Georgia, the University of Georgia Athletic Association, Charles E. Martin, the School of Technology, the Georgia Tech Athletic Association, nor Dr. A. H. Armstrong, nor either or any of them, nor any person or persons acting by, through, or for them, or any of them, in the promoting, sponsoring and/or holding of intercollegiate athletic contests between teams composed of students of the University of Georgia and/or the School of Technology and teams composed of students of other colleges and universities, or between teams composed of their own students, respectively, to which the public is admitted upon the payment of an admission charge and for which an admission charge is made, is a governmental agency engaged in carrying out an essential governmental function, and no part of the funds involved in this proceeding is the property of complainant or subject to its use for any purpose whatsoever.

n that the evidence conclusively shows that the
mounts collected as tax on admissions to athletic
ontests carried on by the University of Georgia
thletic Association and the Georgia Tech Athletic
ssociation were collected from purchasers of such
dmissions for the United States as and for the tax

imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and would not have been so collected had it not been for the provisions of such statute, and, further, that the conducting of athletic contests and charging admissions thereto on the scale and for the purpose and for the revenue shown by the evidence is not primarily an educational undertaking or an undertaking of the State essential to the execution of any of its governmental functions.

XV. The Court erred in refusing to make defendant's requested conclusion of law numbered XII. and to conclude:

> That this suit is specifically prohibited by the provisions of Section 3224, Revised Statutes.

in that the record contains no sufficient nor substantial evidence from which any conclusion or inference can be drawn that there exists any special or extraordinary circumstances sufficient to remove this case from the inhibitions of Section 3224, Revised Statutes.

XVI. The Court erred in refusing to make defendant's requested conclusion of law numbered XIII. and to conclude:

> That complainant has a plain, adequate and complete remedy in the ordinary course at law.

in that complainant has failed to sustain its burden of proving that it is without a plain, adequate and complete remedy at law, while on the contrary under

the law the person receiving any payments for admissions, and collecting the amount of the tax imposed by Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, upon payment of the tax, may file a claim for the refund thereof, and in case of rejection of such claim, may maintain an action at law for the recovery of all or any part of the amount so paid which he may claim to have been exacted illegally, whereby this proceeding is prohibited by the provisions of Section 267, Judicial Code.

XVII. The Court erred in refusing to make defendant's requested conclusion of law numbered XIV. and to conclude:

> That there is no actual controversy between complainant and defendant or between any parties over which this Court has jurisdiction within the purview of the Declaratory Judgment Act..

in that under the law and the evidence this is a proceeding involving a Federal tax, and the maintenance of such a proceeding is prohibited by Section 274 (d) of the Judicial Code, as amended by Section 405 of the Revenue Act of 1935..

XVIII. The Court erred in refusing to make defendant's requested conclusion of law numbered XV. and to conclude:

> That this proceeding is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

in that under the law and the evidence this is a proceeding involving a Federal tax, and the maintenance of such a proceeding is prohibited by Section 274 (d) of the Judicial Code, as amended by Section 405 of the Revenue Act of 1935.

XIX. The Court erred in refusing to make defendant's requested conclusion of law numbered XVI. and to conclude:

> That under the law and the evidence the complainant is not entitled to the relief prayed for in a court of equity.

in that this is a proceeding for a decree enjoining the collection of a Federal tax and for a declaratory judgment with respect to the constitutionality of the taxing statute and complainant has failed to establish, either by pleading or proof, any facts which would legally or equitably entitle it to any such relief.

XX. The Court erred in refusing to make defendant's requested conclusion of law numbered XVII. and to conclude:

> That under the law and the evidence the record does not contain any substantial evidence to sustain findings of fact and conclusions of law and decree in favor of the plaintiff and against the defendant.

in that the evidence conclusively shows that the transactions involved are taxable within the meaning of Title V of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and

Articles 1-3, 12-13, 16, 27, 28-32, 43-46, 53-55, Regulations 43, approved June 14, 1932, promulgated thereunder; and the collection of such tax comes within the purview of Sections 502, 1100, 1101, 1102, 1103 (as amended), and 1104 of the Revenue Act of 1926; and the record contains no sufficient nor substantial evidence to sustain a finding or conclusions to the contrary.

XXI. The Court erred in refusing to make defendant's requested conclusion of law numbered XVIII. and to conclude:

> That the pleadings and the evidence in this case, with every inference that may be drawn from it, are insufficient in law to sustain a judgment and decree in favor of the plaintiff and against the defendant.

in that the record contains no sufficient nor substantial evidence to sustain a decree against the defendant.

XXII. The Court erred in refusing to make defendant's requested conclusion of law numbered XIX. and to conclude:

> That the defendant, on the pleadings and the evidence in this case, is entitled to judgment and decree in its favor against the plaintiff dismissing the bill of complaint.

in that the pleadings and the evidence, with every inference of fact that may be fairly drawn therefrom, are insufficient to sustain a finding of fact or conclusion of law against defendant.

XXIII. The Court erred in making and entering the findings of fact and the whole thereof, made by the Court, for the reason that the same are not in conformity with the provisions of Equity Rule 70½, and fail to find upon all of the issues presented by the pleadings which were sustained by sufficient and substantial evidence in the record and inferences which may fairly be drawn therefrom, in that the conclusive and undisputed evidence establishes that the conducting of athletic games by the University of Georgia Athletic Association and the Georgia Tech Athletic Association, to which admissions are charged, was and is primarily for revenue purposes; that participation in intercollegiate games by students attending the University of Georgia or the School of Technology is not required for graduation, and no credits toward a scholastic degree are given such students by reasons of their participation in such games; that not to exceed 40 or 45 out of the entire student body participate in such games; that special inducements are offered and given to students, such as scholarships, consisting of board and tuition, and other awards, to obtain their services as football players; that intercollegiate athletic contests are not a part of the curricular activities of either the University of Georgia or the School of Technology; that the intercollegiate athletic activities are carried on at each school by separately incorporated athletic associations, and the Department of Physical Education at each school is carried on by separate faculties under the supervision of complainant; that no department or curricular activity of either school is carried on by a separately incorporated corporation or association; that both

the University of Georgia Athletic Association and the Georgia Tech Athletic Association, through their respective officers, agents, servants, and employees, had each collected from purchasers of tickets to their respective intercollegiate events the respective amounts required by law to be collected as admissions tax thereon, amounting in all to the respective amounts involved in this cause; that the proceeds of admissions received by the respective athletic associations were kept in their own separately maintained bank accounts, and were disbursed for their own uses and purposes, respectively, by their own checks signed by their own respective corporate officers, and that no part of such funds was turned over to complainant for its use in any capacity whatsoever, except in one or two instances when loans were made for the completion of a dining room in one of the school dormitories; that notices of liens upon the property and rights to property of each of the athletic associations were filed in the office of the Clerk of this Court and in the offices of the proper county recorders subsequent to the assessment of the tax involved in this cause; that no part of the funds levied upon by the defendant in the respective bank accounts carried by the athletic associations was the property of complainant, but was the proceeds of the amounts collected by the respective athletic associations as tax on admissions pursuant to the applicable taxing statute; that no part of the funds levied upon comes from taxes levied by the State of Georgia on its taxpayers or appropriated for any purpose by the Legislature of Georgia; that a claim for refund of admissions taxes collected by Georgia Tech Athletic

Association on admissions during the fall and winter of that year was filed by it with the Commissioner of Internal Revenue, and the claim was rejected by the Commissioner upon the ground that the said admissions were not exempt from taxation by reason of the provisions of subdivision (e) of Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932; and in that said findings ignore complainant's Exhibits 3, 4, and 8, and defendant's exhibits numbered 1, 2, 3, 4, 5, 5A, 5B, 5C, 6A, 6B, 7, 8, 9, 10, 11, 12, 13, 14, 15, 20, 25, 26, 27, 28, 29, and 30; and in that said findings are insufficient to support a decree in favor of the complainant and against the defendant.

XXIV. The Court erred in making and entering that part of finding of fact numbered 3, made by the Court, as follows: "These associations have control of physical education", in that such part of such finding is contrary to the evidence, and the record contains no sufficient nor substantial evidence to support such finding of fact, it being established by undisputed and conclusive evidence that physical education at both schools is under the direct control of separately maintained faculties, while intercollegiate athletic activities are under the control of the respective athletic associations.

XXV. The Court erred in making and entering findings of fact numbered 4, 5, 6, and 7, made by the Court, in that such findings are wholly immaterial to any issue in this cause; are based upon immaterial and irrelevant testimony admitted by the Court over the objections of the defendant; are incon-

sistent with all the findings of ultimate and evidentiary facts made by the Court; and are insufficient to support a decree in favor of the complainant and against the defendant.

XXVI. The Court erred in making and entering that part of finding of fact numbered 5 made by the Court, as follows: "Approximately thirty percent of them engaged in intercollegiate contests", in that such part of such finding is contrary to the evidence, and the record contains no sufficient nor substantial evidence to support such finding of fact, it being established by undisputed and conclusive evidence that the tax involved in this cause arose out of admissions to football games played during the months of September and October, 1934; that the major portion of the income of the respective athletic associations is derived from admissions to football games; and that not more than 40 or 45 students from each school were participating in intercollegiate football.

XXVII. The Court erred in making and entering finding of fact numbered 8 made by the Court, as follows:

> The expenses of physical education and athletic programs at each college are supported in large measure from admission charges to athletic contests. In addition, a small student's fee is collected from each student, which is used for such purpose. The entire expenses of physical education and athletic programs in the two colleges are met by said admission charges and student's fees.

in that such finding is contrary to the evidence, and

the record contains no sufficient nor substantial evidence to support such findings of fact, ignores defendant's Exhibits 1 and 3, being reports of audits of the accounts of University of Georgia Athletic Association and Georgia Tech Athletic Association for the year involved, showing receipts and disbursements of the respective athletic associations, and showing that no part of said funds was paid over to complainant for its use in any manner whatsoever, offered and received in evidence without objection; and it being established by undisputed and conclusive evidence that the expenses of physical education at each college are not supported from admission charges to athletic contests, but to the contrary, the proceeds of such admission charges are used by such athletic associations in defraying their respective expenses in connection with carrying on their athletic contests and in the purchase of athletic equipment and facilities to enable them to carry on their athletic activities more efficiently.

XXVIII. The Court erred in making and entering finding of fact numbered 12 made by the Court, as follows:

> Upon failure of complainant and its branches and instrumentalities to make returns and pay taxes on said admissions, defendant made returns of same, claimed as due and owing for the months of September and October, 1934, amounting to $895.37 from the University of Georgia Athletic Association, and amounting to $3,914.63 from Georgia Tech Athletic Association. Assessments of said amounts were thereafter made by defendant.

hat such finding is contrary to the evidence; ig-
es compliant's Exhibit 3 and defendant's Ex-
ts 2 and 9, showing the purposes for which the
pective athletic associations were incorporated,
that the assessments were made by the Com-
sioner of Internal Revenue and not by the de-
dant, against the respective athletic associations,
ir officers, agents, and servants, and not against
complainant, offered and received in evidence
hout objection; it being established by undisputed
conclusive evidence that no assessments have
n made against complainant or any of its branch-
or instrumentalities, but that such assessments
e been made against the respective persons re-
ving payments for the admissions involved, be-
the athletic associations and their respective
cers, agents, and employees.

XXIX. The Court erred in making and entering
ling of fact numbered 14 made by the Court, as
ows:

> The ten per cent. of the admissions collected by the two athletic associations was placed in the bank accounts maintained by said associations respectively, but nominally in the name of Charles E. Martin, Trustee, University of Georgia Athletic Association, University of Georgia Department of Athletics, and Athletic Association of University of Georgia; and Georgia Tech Athletic Association.

that such finding is contrary to the evidence, it
ng conclusively established that the amounts de-
ited in the respective bank accounts maintained

by the athletic associations upon which levies were made by the defendant were in fact the actual amounts collected by said athletic associations, as tax, from purchasers of tickets of admission to their respective athletic events, and not ten per cent of total ticket sales.

XXX. The Court erred in making and entering that part of finding of fact numbered 14 made by the Court, as follows: "Thereafter the association filed a claim for refund on behalf of complainant", in that such part of such finding is contrary to the evidence, and the record contains no sufficient nor substantial evidence to support such finding of fact; ignores plaintiff's Exhibits 10 and 11, being claim for refund for taxes on admissions in 1932, filed by Georgia Tech Athletic Association with the Commissioner of Internal Revenue, showing that such claim was filed by the association on its own behalf and not on behalf of complainant, and being the letter from the Commissioner of Internal Revenue to the association notifying it of the rejection of its claim, showing that it is addressed to the association and not to complainant.

XXXI. The Court erred in concluding as a matter of law and adopting conclusion of law numbered 2 made by the Court, as follows:

> The title to all property of every nature whatever and all funds held by complainant, directly or by its agents and instrumentalities, including the funds of said athletic associations, are held by complainant as an instrumentality of the State of Georgia and are the property and funds of the State of Georgia.

in that such conclusion of law is contrary to the evidence, it being established by conclusive and undisputed evidence that the funds levied upon are the proceeds of the amounts collected by the respective athletic associations as the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, which was kept separate and apart from any other funds in the possession of the respective athletic associations; is contrary to the express provisions of said statute and the applicable provisions of Treasury Regulations 43, promulgated thereunder; ignores and is contrary to the express provisions of Section 607 of the Revenue Act of 1934; ignores and is contrary to the interpretation of a statute of the State of Georgia, to-wit, Georgia Laws, 1931, pp. 20-31, by the court of last resort of the State, as expressed in **State v. Regents of the University System,** 179 Ga. 210; is inconsistent with and not supported by the facts found by the Court; and the record contains no sufficient nor substantial evidence to sustain such conclusion of law.

XXXII. The Court erred in concluding as a matter of law and adopting a conclusion of law numbered 3 made by the Court, as follows:

> Complainant was given by the Act creating it, full authority to establish and approve such rules and regulations and courses of study in its educational program as it saw fit.

in that such conclusion of law infers that intercollegiate athletics is a required course of study at the University of Georgia and at the School of Technol-

ogy, and that such inference is contrary to the evidence, and the record contains no sufficient nor substantial evidence sufficient to sustain such conclusion of law, it being established by conclusive and undisputed evidence that participation in intercollegiate athletics is not required of students in attendance at either of said institutions, nor are credits towards a degree given for any such participation.

XXXIII. The Court erred in concluding as a matter of law and adopting conclusion of law numbered 4 made by the Court, as follows:

> The adoption, direction and supervision by complainant, acting directly or through its agents and instrumentalities, of the program of education at the two branches of the University System of Georgia, the University of Georgia and the Georgia School of Technology, including the promotion of physical training as an integral part of its educational activities, including intercollegiate athletic contests, such as football, and the collection of admission fees at games when admission fees were charged, were, under the decision of the Circuit Court of Appeals in this case, the exercise of an essential governmental function of the State of Georgia; and there existed no liability upon it or its agents or instrumentalities for any Federal admission tax or penalty for failure and refusal to collect any such tax, and an injunction should issue restraining the defendants from attempting to collect the alleged taxes, debt, or penalties, except by due proceedings in a court of competent jurisdiction.

in that such conclusion of law is contrary to the ex-

press provisions of Section 3224, Revised Statutes; and is not supported by any substantial evidence; ignores and is contrary to the express provisions of Section 274 (d), Judicial Code, as amended by Section 405 of the Revenue Act of 1935; ignores and is contrary to the express provisions of Section 267, Judicial Code; ignores and is contrary to the express provisions of Title V of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932; ignores and is contrary to the express provisions of Section 607 of the Revenue Act of 1934; is contrary to the evidence, it being established by conclusive and undisputed evidence that intercollegiate football is not a part of the program of education at either the University of Georgia or the School of Technology, is not required of students attending either of said institutions, and that no credits towards degrees are given at either of said institutions by reason of participation in intercollegiate football; and the record contains no sufficient nor substantial evidence to sustain such conclusion of law.

XXXIV. The Court erred in making and entering the final decree entered herein by the Court, in that the facts found by the Court are insufficient to support a decree in favor of the complainant and against the defendant, and the record contains no sufficient nor substantial evidence to sustain such decree in favor of the complainant and against the defendant.

XXXV. The Court erred in making and entering the final decree entered herein by the Court, in that

the pleadings and evidence, with inference of fact that may be fairly drawn therefrom, are insufficient to sustain a decree in favor of complainant and against the defendant, but on the contrary, in view of the provisions of Section 3224, Revised Statutes, conclusively show that the Court is without jurisdiction to enter a decree in favor of complainant and against the defendant.

XXXVI. The Court erred in making and entering the final decree entered herein by the Court, in that it is in effect a decree against the United States which may not be sued without its consent and which has not consented to be sued, since the United States is the real party in interest in so far as levies, warrants for distraint, and/or liens for Federal taxes are concerned.

WHEREFORE, defendant and appellant prays that the judgment and decree made and entered by the District Court herein be reversed, and that said cause be remanded to the District Court with instructions to enter judgment and decree for the defendant, dismissing complainant's bill of complaint, and that he be given such other and further relief as to the Court may seem just and proper.

Dated this 3rd day of April, 1937.

LAWRENCE S. CAMP,
United States Attorney.
M. NEIL ANDREWS,
Assistant United States Attorney.

Filed April 3, 1937.

PRAECIPE

TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA:

Sir:

You will please prepare a transcript of record to be transmitted to the Circuit Court of Appeals for the Fifth Circuit in pursuance to the appeal heretofore taken in this cause, and include therein the following:

1. The original bill of complaint, omitting Exhibits A-B-C-D.

2. The amendment to the original bill of complaint.

3. The motion to dismiss filed by the defendant.

4. Amendment to motion to dismiss filed by defendant.

5. Motion to strike amendment to petition filed by defendant.

6. Answer.

7. Defendant's motion to dismiss bill of complaint.

8. Defendant's motion for special findings of fact and conclusions of law.

9. Order on motion to dismiss.

10. Complainant's motion for findings of law and fact.

11. Opinion of the Court.

12. Final decree of the Court.

13. Motion to reproduce parts of the testimoney in verbatim form.

14. Order directing the reproduction of parts of the testimony in verbatim form.

15. Statement of evidence.

16. Petition for Appeal.

17. Order allowing appeal.

18. Assignments of Error.

19. Citation with acknowledgment of service thereon.

20. This praecipe including acknowledgment of service.

21. Order for transmission of original Exhibits to appellate court.

22. Clerk's certificate.

Dated this 13th day of April, 1937.

LAWRENCE S. CAMP,
United States Attorney.

M. NEIL ANDREWS,
Assistant United States Attorney,
Solicitors for Defendant.

The foregoing praecipe for the transcript of record on appear is hereby approved by the appellee.

April 13, 1937.

M. J. YEOMANS,
Attorney General State of Georgia.
HAROLD HIRSCH and
MARION SMITH,
M. E. KIRKPATRICK,
Counsel for Complainant-Appellee.

Filed April 13, 1937.

ORDER DESIGNATING PHYSICAL EXHIBITS.

It appearing to the Court that in this cause it is necessary and proper in the opinion of the Court that certain original papers and documents should be inspected by the Circuit Court of Appeals for the Fifth Circuit upon appeal to said Court, and by the Supreme Court, in case said cause should go to that Court; it is therefore

ORDERED, that the following papers, to-wit: Plaintiffs Exhibits numbered 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, and 12, and Defendant's Exhibits numbered 1, 2,

3, 4, 5A, 5B, 5C, 6A, 6B, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, referred to and described in the Statement of Evidence, be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, and if this case should be taken to the Supreme Court of the United States, to the Clerk of that Court, at Washington, District of Columbia, and returned after the disposition of said appeal or appeals to the Clerk of this Court.

Dated this 13th day of April, 1937.

E. MARVIN UNDERWOOD,
District Judge.

Filed April 13, 1937.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF GEORGIA
ss:

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 428 pages contains, a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, appellant, versus REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this April 16th, A. D., 1937.

J. D. STEWARD,
Clerk, U. S. District Court,
Northern District of Georgia.

(SEAL)

By C. A. McGREW, Deputy Clerk.

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the United States Circuit Court of Appeals.

BLANK

PAGE

Extract from the Minutes of October 11th, 1937

No. 8466

V. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA (MARION H. ALLEN, COLLECTOR, ETC., SUBSTITUTED IN PLACE OF W. E. PAGE, COLLECTOR, ETC., DECEASED)

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

Argument and submission

On this day this cause was called, and, after argument by Carlton Cox, Esq., Special Assistant to the Attorney General, for appellant, and Marion Smith, Esq., for appellee, was submitted to the Court.

Opinion of Court and dissenting opinion of HUTCHESON, Circuit Judge, filed December 18, 1937.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8466

V. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA (MARION H. ALLEN, COLLECTOR, ETC., SUBSTITUTED IN PLACE OF W. E. PAGE, COLLECTOR, ETC., DECEASED), APPELLANT

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Georgia

Opinion

December 18, 1937

SIBLEY, Circuit Judge: The Board of Regents of the University System of Georgia and the corporation styled Regents of the University System of Georgia, sought an injunction against W. E. Page, as Collector of Internal Revenue, to stop his seizure under warrants for federal taxes on admissions to intercollegiate football games during September and October 1934, of moneys which the Regents claim. A declaratory decree settling the federal nontaxability of athletic contests held under authority of the Regents was also prayed.

This court has heretofore reversed a dismissal of the bill, and has ordered it tried on its merits. Regents vs. Page, Collector, 81 Fed. (2d) 577. The District Court has found the allegations of the bill proven, and decreed a final injunction. This appeal followed.

Page resigned as Collector pending this appeal, and afterwards died. Marion H. Allen succeeded him in office. On allegations that he was about to carry out what Page had begun, Allen was cited to show cause why he should not be made a party as successor in office under 28 U. S. C. A. Sec. 780. Allen did not controvert the allegations of fact, but objected that the action against Page was a personal one and could not thus be made one against the office of Collector and in effect against the United States. The statute referred to, so far as material to be quoted, provides: "When during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States * * * relating to the present or future discharge of his official duties, such officer * * * ceases to hold such office, it shall be competent for the court * * * whether one of first instance or an appellate tribunal, to permit the cause to be continued or maintained against the successor, etc." This case is within the words of the statute. Without enlarging on its purpose and history, we apply it by ordering the successor made a party.

The appellant desires to reopen the questions whether the holders of the money distrained upon, having collected it from ticket purchasers as tax, can deny the validity of the tax when called on to pay it over; and whether injunction is an available remedy to prevent its collection. This court in its former decision held that the money was not collected as a tax, but under a peculiar contract with the ticket buyers whereby the complainants were entitled to assert ownership of it if they could prove that no tax is collectible. It was also held that under the peculiar circumstances, including that just mentioned, injunction was an available remedy. These holdings are adhered to as the law of the case. The next and great question is whether the tax is constitutionally collectible in view of the connection of the Regents with the State government. It will be well to examine first the tax and its incidence, and the status of the Board of Regents.

The tax is imposed by Section 500 of the Revenue Act of 1926, 44 Stats. 91, amended by Section 711 of the Revenue Act of 1932, 47 Stats. 271, and is "a tax of one cent for each ten cents or fraction thereof of the amount paid for admission to any place * * * to be paid by the person paying such admission." Admissions less than forty-one cents are not taxed. Exempted are "any admissions all the proceeds of which inure exclusively to the benefit of religious, educational, and charitable institutions, etc."; but the exemption "shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the

military or naval forces of the United States)." The tax is thus collectible on all athletic games or exhibitions of which any college or university gets all or a part of the proceeds, whether it be a football game, a track meet, or other athletic exhibition; whether an intercollegiate contest or one intra mures; and whether participated in by students or hired athletes. As applied to a State University the tax is to be viewed not simply as one on intercollegiate football games but on all forms of athletic exhibitions to which admission exceeding forty-one cents is charged. Congress expressed no special purpose to single out intercollegiate football contests for taxation. While they were the occasion of the tax before us, the legitimacy of the tax as applied to a State university involves a wider field of discussion.

The tax is laid on the purchasers of admissions, but the duty and responsibility of collecting and accounting for it is put on those selling the admissions. Where the State and its agencies are sellers, there is thus an immediate and direct burden imposed by the federal government. But if this burden be ignored, that laid upon the patrons of the athletic exhibition is felt by the State, for the tax tends to deter patronage. It may have to be absorbed by the State by reducing the price of admission. In the present case the football tickets were sold on a basis of $1.36 for admission and fourteen cents for tax, total $1.50. It seems very probable that $1.50 was the price the public was willing and accustomed to pay, and that the fourteen cents tax, if collectible, was to be absorbed by a reduction in the price.[1] The tax affects the State quite as directly as when the recipient of its bond interest has to pay a federal tax on it, Western vs. Charleston, 2 Pet. 449; or a State judge a federal tax on his salary, Collector vs. Day, 11 Wall. 113; or a State waterworks superintendent a federal tax on his salary, Brush vs. Commissioner, 300 U. S. 352. When it is a question of the federal government burdening by taxation the government operations of the States, or vice versa, it is not the amount of the burden but its real existence and its possibilities that condemn the tax. This is so in this special field of constitutional law because "the power to tax involves the power to destroy," in that the amount of tax if the power be once admitted must be left to the taxing legislature; as was fully explained in McCullough vs. Maryland, 4 Wheat. 316. Whether this stringent rule peculiar to our constitutional system of double government is to be applied in any case depends upon whether the function burdened by the tax is really a governmental function or some business or proprietary enterprise customarily and normally a matter of private operation and within the usual field of taxation. See South Carolina vs. United States, 199 U. S. 437; Metcalfe & Eddy vs. Mitchell, 269 U. S. 514; Brush vs. Commissioner, supra.

[1] The general exemption from the tax of admissions which inure to the benefit of religious, charitable, and educational institutions was made because Congress knew the burden would fall thus on the institutions.

There is a faint contention made here that higher education
a legitimate governmental function, though common schools ar
mitted to be necessary to the success of a democracy. It is true
historically higher education in America was for a long period
nished by church seminaries and privately endowed and ope
colleges, but this was due to the lack of public funds and not
failure to recognize that highly educated leaders are also nece
to the success of democracy. George Washington himself urged
sought to found a college for higher education in Virginia
Thomas Jefferson pushed the idea to fruition in Virginia's Un
sity. Even before this, Georgians were pressing the matter.
Georgia Constitution of 1777, Sec. LIV, provided: "Schools sh
erected in each county and supported at the general expen
the State as the Legislature shall hereafter point out and di
Numerous Acts of the period establishing towns and counties co
provisions for schools and academies in them. When by the A
1784 the Counties of Washington and Franklin were laid out,
thousand acres of land of the first quality were set apart "fo
endowment of a college or seminary of learning." Watkins' D
page 293. The following year, 1785, the University of Georgi
created and its property vested in a corporation styled "The Tr
of the University of Georgia," and its government (subject t
Legislature) was committed to the Trustees and a Board of Vis
The Trustees, appointed by the Governor, with various changes
tinued until 1931, when they were succeeded by the Board of Re
complainants here. The preamble to the ancient Act, Watkins
gest, page 299, is an unanswerable argument for higher educati
a function of democratic government. It reads in part: "As
the distinguishing happiness of free government that civil
should be the result of choice and not necessity, and as the co
wishes of the people becomes the laws of the land, their public
perity and even existence very much depend upon suitably for
the minds and morals of their citizens. * * * This is an infl
beyond the sketch of laws and punishments, and can be claimed
by religion and education. It should therefore be among the fir
jects of those who wish well to the national prosperity to enco
the principles of religion and morality, and early to place the
under the forming hand of society, that by instruction they m
molded to the love of virtue and good order. Sending them a
to other countries for their education will not answer these pu
* * * and will always be the cause of so great foreign a
ments that upon principles of policy it is not admissible, etc."
University of Georgia as a seat of higher learning with branch
many parts of the State, has remained imbedded in the Consti
and the statutes of the State ever since. The State of Georgia
came into the Federal Union with this University declared as a
of its governmental activity.

The Regents were created by the Act of 1931 reorganizing the executive departments of the State. Acts of 1931, page 7. Section 45 is: "There is hereby set up and constituted a department of the State government of Georgia to be known as the Board of Regents of the University System of Georgia. The name of the corporation heretofore established and existing under the name and style 'Trustees of the University of Georgia' be and the same is hereby changed to Regents of the University System of Georgia." Section 48; "The government of the University of Georgia and of all its branches * * * is vested in the Board of Regents." By Section 50 the Board is composed of persons appointed by the Governor and confirmed by the Senate, and the Governor is ex officio a member. Section 51 fixes their term of office, and Section 59 their pay. By Section 77 "The expenses of the Board of Regents other than that of the institutions under its control shall be met by a separate appropriation enacted for its maintenance and support." By Sections 55 and 65 the powers, rights, privileges, and duties of the former Board of Trustees of the University of Georgia are vested in the Regents. These provisions make it very plain that the members of the Board of Regents are public officers having power to govern the University System, and that the corporation styled Regents of the University System of Georgia is a public corporation intended to hold the title to its property and do its business. The relation of the Regents and the Corporation to the State was considered in State of Georgia vs. Regents, 179 Ga. 210. These expressions occur in the opinion: It is thus seen that the Regents of the University System of Georgia is a distinct corporate entity though controlled by a Board of Regents which is designated as a department of the State government." "So long as the Board does not exercise its powers capriciously and arbitrarily, or so as to thwart the purpose of the Legislature in establishing a system of university education, the Board itself must determine what is necessary for the usefulness of the system and thus will govern the University of Georgia and its several branches. The powers granted are broad and comprehensive, and subject to a wise and proper discretion the Regents are untrammeled except by such restraints of law as are directly expressed or necessarily implied." "It may be conceded that the State is the actual and beneficial owner of all property now vested in the Regents of the University System, and that the corporation by that name is the holder only of the legal title." That the Regents are public officers and the funds they raise are public moneys, and specifically those raised by the athletic associations such as are here involved, was emphatically declared by the Legislature in the Act of 1935. Acts 1935, page 171. There can be no doubt that the Board of Regents and the instrumentalities which they employ, including the athletic associations, are governmental agencies of education.

The last and most doubtful question is whether athletic games and exhibitions for which admission is charged can be considered a part

of the governmental function of education at a State university so as to be free of federal taxation. That the Board of Regents have both at the University at Athens and the Technological School at Atlanta made physical education an integral part of the University's function, and that they authorize and supervise public exhibitions for which admission is charged as a part of the program admits of no doubt. The formal catalogues and bulletins of both institutions set forth at length the opportunities and the requirements for physical education. At Athens all students, male and female, are required to take two years of such education, military drill for males being recognized as equivalent. One teaching degree includes sports in its curriculum, being designated to qualify graduates not only to teach in the State High Schools but to direct the physical education in such schools. In both institutions the head of the Department of Physical Education holds the office of Dean of Men in the faculty. Other instructors, often called "coaches," are also members of the faculty. The conduct of athletic contests and the qualifications of contestants are regulated by faculty rules approved by the Regents and are related to scholastic standing. The schedule of contests for each year is approved by the faculty and by the Regents. Their details are handled at each institution by an Athletic Association composed of faculty members and alumni and incorporated to facilitate such business transactions as the improvement of the athletic grounds and equipment. They are wholly under control of the Regents and are their agents. The Chancellor of the University System is himself president of the Athletic Association at Athens. The taxes here in question were assessed against these associations, and the pleadings of the Collector insist that the associations are to be considered separate from the Regents of the University System, but that position is untenable and has been abandoned in argument. The tickets which gave rise to the tax show on their face that they were sold for the University for they state that the University of Georgia contends that there is no liability to the tax, but the University is collecting the fourteen cents as a part of the charge of admission and will retain it as such if a tax is not collectible. The money from admissions is like all other funds of the associations, audited by the State Auditor and as already stated was claimed specifically as the State's by the State Legislature itself in the Act of 1935. The highest State governmental authority has thus ratified the use of the associations and the charge for admissions to the games as proper functions of the University.

Athletics as a formal feature of education is recent in America aside from military and naval exercises. But the conception and practice go back at least to the ancient Greeks. The Olympic and Isthmian games were public institutions designed especially to promote physical development, and their crowns were the honors most sought after. At Athens the stadium was hard by the theater, and both were public institutions. Plato in his Republic names gym

nastics as the second in the trilogy of public educational activities. The Germans today call their high schools gymnasiums. In America the acquisition of grounds for school athletics is held to be a proper educational purpose, and even to authorize condemnation of the land. Reiger vs. Board of Education, 287 Ill. 590; 122 N. E. 838; School District vs. Chelan County, 69 Wash. 189; 124 Pac. 484. Apparatus for football and basketball may be bought with public funds. Anderson vs. Board of Education, 49 N. D. 181, 190 N. W. 807. Damages arising from injuries in the gymnasium and on football field are not recoverable because the activities are a part of the educational program and so a governmental function. Spencer vs. School District, 121 Ore. 511, 254 Pac. 357; Mokovitch vs. School District, 177 Minn. 446, 225 N. W. 292. An athletic association was held exempt from taxation because an educational institution in German Gymnastic Association vs. Louisville, 117 Ky. 958, 80 S. W. 201. Although the scholar for a long period looked down upon the athlete, at this time we are recurring to the ancient idea that the body cannot be neglected while educating the mind.

Public contests are not an abuse of physical education. It is true they employ but a few of the students, but they give stimulus and life to the whole athletic enterprise. "To make the team" in any athletic sport is a supreme incentive to careful and systematic effort; and to star upon it is like an Olympic crown. Great judgment is necessary to prevent the stimulus of publicity from becoming too great, lest the athletic tail be found wagging the dog of mental culture in the schools, but in principle the public exhibition of the best in athletics is not different from the school exhibitions of our boyhood or from the honors and speakerships at Commencements of most colleges.

The contest between colleges in athletics are only a superlative degree of the public exhibition. They resemble the intercollegiate debates of the oratorical department; but the present public taste welcomes the former far more enthusiastically than the latter. Baseball, basketball, tennis, golf, boat-racing, field athletics, as well as football, are made the subject of inter-collegiate contests, but in popularity by far the greatest of these is football. But the record discloses that this was not always so, for baseball greatly overshadowed football until after the World War. The writer can remember when Field Day was the day of glory for athletes at the University.

The charging of admission to athletic contests and exhibitions does not alter their educational or their governmental status, though it adds a danger of prostitution. It is common for educational exhibitions to be financed by admission charges, which have often been also a source of revenue to the school. School exhibitions of the older days were instances. Dramatic entertainments and public debates by students in English education, and by Glee Clubs in musical education, are modern instances. The income from all these at

the University is audited, and the net earnings go to the institution. So it is of athletic events. The University has never had adequate support by appropriations of tax money, and has had to seek other income. It is admitted that the Department of Physical Education could not be maintained but for admission charges. These mainly support that Department, including most of the salaries, the purchase of equipment, and the improvement of the athletic fields, and they help maintain the infirmary; but there have been surpluses turned into the common fund nominally as loans but never repaid. The inter-collegiate football contests at present furnish by far the greater part of this income. The admission charges authorized by the Regents (and claimed by the Legislature) to any student activity, whether athletic, musical, or literary, which is recognized as a part of the educational program, and to be used wholly in its support are in their nature a governmental arrangement for public revenue. Governments raise money by taxation, by licenses, and by selling what they have that is salable. A license may be issued as an aid to regulation under the police power, or it may be for revenue, and in both aspects it is the exercise of a governmental function. An admission ticket to an athletic exhibition held as a part of an educational program, the money to be used for the support of such education, is when issued under authority of the State not unlike a license. It raises money from the purchaser for a public purpose which otherwise would call for taxation. To prohibit or to tax it is an interference with legitimate governmental financing. Each student at the University and the School of Technology is charged at matriculation ten dollars as an athletic fee which helps support the Department of Physical Education and entitles the student to the privileges of the gymnasium and swimming pools and athletic grounds, and to admission to all athletic events. It would hardly be supposed that these fees could be federally taxed, though they are for a seasonal admission to the University and its facilities, and within the words of the statute.

It may be conceded that for the Regents to hire athletes to give performances in order to make money would be taxable, for it would be for the State to enter a commercial field. In exhibitions of the State's own students there is an education of the few who directly participate in coolness and self-control under supreme excitement, in loyalty and teamwork, and a rewarding of them for faithfulness and proficiency in their physical training. There is also stimulated the interest and the efforts of all students in athletics. Between using the students in the Department of Physical Education and hiring performers there is about the difference that existed between the Greek citizen games and the Roman gladiatorial shows. It must be admitted also that there has existed in college football a practice through the use of scholarships or other things of securing

football players rather than students. This abuse has been due more to enthusiastic alumni than to college authorities, but it has in general been corrected. There can be no such charge made against the management of the Regents as exhibited in this record. The patrons of inter-collegiate football games probably do not connect what they see and hear, and especially what they themselves do, with education, but that does not change the ultimate truth. There are also many problems connected with such games that have led some institutions to reject them as undesirable, but their value in the educational program is for the judgment of the educational authorities. Where the State government includes them as useful and incidentally uses them as a source of income it is not for the federal tax officers nor for the judges to overrule their decision. Under long-established principles the United States ought not to tax these admissions, and the statute will be held not to apply to a State university.

Judgment affirmed.

HUTCHESON, Circuit Judge, dissenting:

On the former appeal of this cause I dissented [2] from the majority view that the 14¢ per ticket the Athletic Associations had collected from purchasers of admission tickets to intercollegiate football games, in addition to the $1.36 charged for admission, had not been collected as a tax, and that a temporary injunction would lie to prevent its summary collection. I thought then, I think now, that the money was collected as taxes, and that without regard to whether the Government or the Regents should be ultimately declared entitled to it, Art. 1543, 26 U. S. C. A. forbade the issuance of an injunction to restrain its collection. I therefore dissent from the conclusion of the majority on this appeal that the former opinion is the law of the case, and that injunction is an available remedy.

I dissent, too, from their conclusion that the federal tax on admissions to "any athletic game or exhibition, the proceeds of which inure wholly or partly to the benefit of any college or university," may not be lawfully laid upon and collected from persons admitted to intercollegiate football games conducted under the auspices of the Athletic Associations of the University of Georgia and of Georgia Tech; that the Government has no interest in or right to have an accounting for the moneys collected from ticket purchasers under the form of receipt employed in this case, and plaintiff is therefore entitled to a permanent injunction.

I subscribe fully to the views the majority opinion advances, that the fostering and support by the State of higher education, by the establishment and maintenance of State universities for instruction in the higher branches of learning, is not only a legitimate, but an essential Governmental function in a republic like ours. I particu-

[2] 81 Fed. (2nd) at p. 583.

larly subscribe to all that is said about the distinguished part furthering this ideal which Georgia and Georgians early took, a have persistently sustained. I could not do otherwise, for it was Georgian, Mirabeau B. Lamar, who, by his message [3] to the fi Congress of the Republic of Texas, in 1838, was instrumental having set apart enormous grants of public lands for the main nance and establishment of a "University of the first Class." that message he pointed out, with an eloquence which has seld been equalled and never surpassed, the necessity to democratic ins tutions of the furtherance, not only of common schools, but of high education. His inspired words—

"Cultivated mind is the guardian genius of Democracy; and wh guided and controlled by virtue, the noblest attribute of man. is the only dictator that free men acknowledge, the only secur that freedom desires."

are the watchwords of the University system of Texas, and throu its persuasive influence, of the whole educational system of that Sta

I have no difficulty, either, in going along with my associates their expressed view that general provision for instruction in, a the practice of, athletics as a formal feature of college education m be justly regarded as proper, and may be legitimately provided out of public funds.

My associates have referred to the German Gymnasia, the Gre Olympics, the Roman games, to which catalog might well be add the games of England's public schools, the boat races on the Tham They have insisted that public contests are not an abuse of physi education, and that contests between colleges in athletics are only superlative degree of the public exhibition. With all of these tions I fully agree, but with the greatest deference I submit th there is a complete non sequitur between these positions and conclusions the majority draw; (1) that the staging and conduct the colorful spectacles which burst into bloom in stadiums all ov America in October and November of each year, are a part of Governmental function of education in a State university; and that if their staging and conduct are matters of Governmental co cern, the collection from the attending public of an admission tax 14¢ a person, is such a direct burden upon the State governme as that within the applicable decisions, the Government of the Unit States may not require the athletic associations which conduct enterprises, to collect the tax for them from purchasers attending games.

---

[3] • • • • "It will be my leading policy • • • to lay the foundations for th higher institutions for moral and mental culture without which no government on de cratic principles can prosper, nor the people long preserve their liberties. • • • we desire to establish a republican government on a broad and permanent basis, it become our duty to adopt a comprehensive and well regulated system of mental moral culture. Education is a subject in which every citizen, and especially every par feels a deep and lively concern. It is one in which no jarring interests are involved, no acrimonious political feelings are excited; for its benefits are so universal that parties are cordially united in advancing it.

"It is admitted by all that cultivated mind is the guardian genius of Democracy, while guided and controlled by virtue, the noblest attribute of man. It is the only dict that free men acknowledge, and the only security that freedom desires."

My associates apparently to their own satisfaction, have rationalized themselves into the frame of mind to believe and to say, that those modern gladiatorial spectacles, conducted in vast and costly amphitheaters, for the excitement and amusement of the American public, all present being keyed to a pitch and under a tension wholly foreign to that ordinarily associated with academic and educational pursuits, are an essential part of higher education in Georgia, and as such, a Governmental function of that State. They have not rationalized me into that frame of mind; I cannot rationalize myself into it. It seems to me that the mental processes by which the din and delight, the struggle and stress, the flying arms and legs, the alternate tangles and extrications, and all the heady actions of an intercollegiate football game are envisioned as higher education, are a "reductio ad absurdum" of even modern higher educational theory. They seem to me in the slangy but expressive vernacular common in the stadiums, to "take higher education for a ride."

The writer of the majority opinion, himself a distinguished product of Georgia's educational system in the days when, as he admits, field day, and not football day, was the day of glory for athletes at the University, and education was education, points with pardonable pride to Georgia's interest in higher education early awakened, and persistently maintained. He justly points out, too, that physical training may properly form a part of university life. With deference, he has not pointed, nor do I think he can point, to any practice, precedent, or principle upon the basis of which it can be successfully maintained, that the conduct of intercollegiate football games for profit, as is now the case in the football season, may be legitimately said to be a Governmental function or activity of any kind, least of all a function of higher education. I think for us to hold otherwise would be having ears, to hear not, and having eyes, to close them to what all but us can see, and this judges may not do.

In the view I take of the matter, the precise setup of a particular State University is unimportant. When the vast spectacular program of fall meetings, of which we take judicial notice, is considered, it is quite evident that from the time the football season opens in early fall, until it closes at Thanksgiving, with its post season spectacles in the Rose Bowl, the Sugar Bowl, the Orange Bowl, the Cotton Bowl, and other bowls galore, it presents a vast hippodrome, colorfully staged and segmentally divided into rings upon rings, where here one set of gladiators, there another, meet and engage in deeds of derring-do, to the frantic cheering of assembled thousands of half mad spectators. More, on game days hundreds of thousands of radios all over the United States pick up the dramatic voices of announcers, and a portion of every program in every moving picture theater during the whole season carries on.

In such view particular arrangements of particular colleges for obtaining performers in this vast series of spectacles, as well as particular arrangements each makes for drawing public interest and public money, fade into insignificance.

We judicially know that in the football season, from coast to coast, from lakes to Gulf, these gigantic, commercialized activities, these intercollegiate football games, absorb the public attention, priming in interest any other form of public spectacle. We judicially know that during the period the members of the football team, at Tech there were fifty, at Georgia about the same, become men set apart. They have their own training table, their own rules. Glorified men at arms, they go abroad, the fighting men of their universities, bringing to it, if they have been well scouted, garnered, and trained, fame, honor, and money galore. If they have not been, no fame, no honor, and a much smaller portion of the gate receipts.

We judicially know that in these games there is a guarantee and division of gate receipts between athletic associations of the respective colleges, and that the greater the fame and prowess of the teams, the greater the gate receipts. We judicially know that the size of the gate receipts has no relation whatever to the educational standing of the colleges, or to that of the members of the teams but entirely to the skill and prowess of the teams in ground gaining, and to that of the individual members, the combatants on the field, in running, blocking, tackling, interfering, kicking, passing, and receiving.

We judicially know that there is quite a difference of opinion among educators and those interested in education, as to whether intercollegiate football games, as they are conducted, are in danger of degenerating into a racket, or have justified themselves. We judicially know, too, that there is no difference of informed, academic, as opposed to legalistic opinion anywhere, upon the proposition that intercollegiate games in themselves, are not part of higher education, and that it is only by dint of the greatest struggles and precautions, on the part of the various conferences which govern these football games, directed toward maintaining scholastic standing and preventing professionalism in too aggravated a form, that they are conducted without great injury to the cause of higher education. But we know, too, that it is thought by many that so managed and conducted, the money and athletic prestige gained for particular colleges by outstanding teams, make the games worth the candle.

When the matters of which we take judicial notice are put to one side, and this particular record is examined, it is found to be not only teeming with evidence as to, but crying out, that the prime reason and incentive for the conduct of intercollegiate football games on the scale and in the manner on which they are being conducted by the

eorgia and Tech Athletic Association is a financial one,[4] and that ithout the financial returns from them, the games, and the stadiums which they are played, indeed the department of Physical educaon itself, would vanish like the mists of the morning.[5]

When it is considered that the record shows that these great edutional exhibitions of the higher learning, these intercollegiate footll games, take in, for Georgia, in an ordinary season of two months early $75,000, and more than that for Tech, and of course substanally the same amount under their guarantees for the teams with hich these teams compete,[6] when, in short, it is considered that in eptember and October of each year these two colleges take from the ublic on admission tickets, to be divided between themselves and eir competitors, over $300,000 a year, it is at once seen that if this education, truly education pays.

My associates seem to concede that if the Athletic Associations mployed or paid men to play upon the teams, if in short, the teams nd the games were not just the by-product of the higher educational rocess as it operates on the general Georgia student body, this ould deprive the games of their higher educational quality, and bject the patrons to tax.

I cannot see this distinction. But if it is a sound one I think the ecord in this case shows sufficiently to bring it under the rule thus t, that the football squad is a special unit in the University, proided for in large part, by scholarships and allowances built up and

---

[4] "Our business manager fixes the price at which we sell football tickets to any parular game. After a period of years we know about what the expenses are, what our kets should be to meet them; that is how we fix the admissions to the games. When refer to expenses I mean the entire expenses of maintaining an athletic department and ging the games, for the purchase of lands, for additional fields, for the maintenance fields, all the salaries of coaches and instructors come out of the proceeds of the nds of the Athletic Associations. The total receipts from Georgia Tech appeared to be excess of $127,000 for the fall of 1934. This is comparable to the receipts from year year from that source, except the boom years 1928 and 1929, the period of our eatest receipts. Our receipts were increased a great deal by $50,000 from the Rose wl game in California in 1929. In that year the school had an excellent team and e total receipts from football in the year were about $200,000."

[5] One of the witnesses for the University of Georgia, when questioned, "What is there out the Department of Physical Education as affects participation in athletic sports at is different from any other department in the University," answered:
"The only difference is that if it were not for the receipts from athletics there would none. No appropriation is made by the State Legislature to go to the Department of ysical Education. If athletic contests were not carried on, we would have no Departent of Physical Education."
A witness for Georgia Tech testified:
"We had a baseball team in 1934. We did not have one in 1935. As to the purpose giving up baseball activities in 1935, college baseball has fallen out. We substituted t ball because instead of having two teams playing hard ball, we could have 30 to 50 ms playing soft ball. There is no student interest in college baseball. There is no blic interest whatever in college baseball."
The President of the University of Georgia testified that they had a college baseball am but it did not pay for itself. "They had a college track team and it did not pay itself. As to all of these intercollegiate sports that we maintain they do not pay for emselves, only football. That is the present public taste. I can remember the time en football did not support itself, and baseball paid the best of all the sports carried It is only since the world war, when people became interested in bodily contact sports, at it has been on a paying basis.
"I regret to say that we could not maintain the physical education we have in athletics thout charging for football games."

[6] The record does not show the amounts of these guarantees, but the audit contains a tement that instead of showing these guarantees in the total amount collected and then ducting them, only the net amounts are given.

maintained by special scouting,[7] and that the intercollegiate acti ties of this picked and special group have no connection whate with either the Department of Physical Education, or the purs of higher learning.[8] Certainly, if they have any connection, it is remote and indirect as that the governmental immunity which mig be extended to the activities of the Department of Physical Edu tion as a part of higher learning, cannot extend to the public exhi tions of the prowess of college football teams. These exhibitio are, in my opinion, as little connected with governmental functi as indirect and remote, as would be the public contests of footb teams recruited from employees of the various instrumentalities the Federal government, beginning with National Banks, listed appellee on page 15 of its brief. I think no one would claim th admissions to games in which football teams maintained by the various governmental activities competed for the public amuseme and the glory and financial advantage of the athletic associatio of these institutions, would be exempt from a State admissions t because the games were part of a governmental function. I can see how any better contention could be made against the federal t for teams maintained by athletic associations of State schools.

Entertaining these views as to the purely business nature a character, from the standpoint of the promoters, of these exhibitio as to which the Government lays a tax upon the spectators, it natural that I should find myself unable to agree that here is edu tion in its higher forms, here a Governmental enterprise.

But if I could agree with my associates that there is more higher education here than meets the eye and ear, and that, thou hidden from me, there is a subtle connection between these gam and the Governmental function, I still cannot agree with them th the tax is not collectible. For it seems quite plain to me that t

---

[7] Professor Armstrong, Associate Professor of History and Economics, and Chairma the Athletic Association, testified that at Georgia Tech they had an interest in getting g players. The general plan of Tech is to find out about them; send out questionnaires quiring whether they are interested in football, whether they need scholarship paid; n rally coaches are interested in getting good players.

It was testified that while the Athletic Association does not have a department of Ph cal Education, in which a degree is granted, it contributed in 1934 around $7,500 to general scholarship fund.

To the question of the Court, "Is any such elaborate and careful effort made to ascert the availability of students particularly qualified along intellectual lines in history, e neering or surveying, or the like," Dr. Armstrong answered: "No, we don't make particular effort to find them, but if a principal is as much interested in his honor stude as a coach is interested in his high school honor students, he can get the same attent as a boy that is playing football."

Q. "As a matter of actual practice and experience, that is not done?

A. "I am afraid the principals do not take the same interest.

Q. "As I understand it, all of the effort is made toward those who have phys prowess?

A. "That is true of the Physical Educational Department.

Q. "Take the Department of History. Have they a separate business manager, co and do they keep a separate set of books, and do they have people who are employe coach and train up special students, and do they have special ones to go out and these students?

A. "No sir; there is no other department in the college that that applies to other t the Social; that is not a strictly educational department."

[8] "Football is not a required subject for a degree for a student who is enrolled in Department of Physical Education. Any student who makes the Varsity Team in Geor or Georgia Tech and goes out and plays in either of these activities, is merely doing voluntarily. He gets no credit for this in the University of Georgia, and in Georgia T there is no Department of Physical Education in which a degree is granted.

"Degrees in the Department of Physical Education are given to those who complete course for teaching physical education."

collection from the attending public of an admissions tax of 14¢ a person is not such a direct burden upon the State government as that within the applicable decisions, the Government of the United States may not require the Athletic Association which conduct the enterprises, to collect the tax for them from purchasers attending the games.

At the risk of weakening the force of my dissent here, by taking broader ground than necessary, I might as well say that I have long believed and unsuccessfully asserted,[9] that claims of governmental immunity from taxation have in the past been too liberally granted. In my view, the test of the constitutionality of a State or Federal tax upon the operations of the United States or of the States, or the means chosen for the execution of the powers of either government, should be whether the taxing statute discriminates against the government affected, and in favor of other taxpayers. But it is by no means necessary for me to go that far here. For under the law as it is now settled by the decisions, particularly that of the United States Supreme Court in James vs. Dravo Contracting Company, delivered December 6, 1937, the levying of a tax not on the State, the Universities, nor on the Athletic Associations, but on and to be paid by the purchasers of tickets is not and cannot be, a direct burden upon a Governmental function of the State of Georgia. Indeed, it falls so indirectly and so remotely as that it cannot really be regarded in law as any burden at all. If a tax on the gross receipts of a contractor derived from a contract between him and the United States, for the construction of locks and dams in a navigable stream is not invalid as laying a burden upon the operations of the Federal Government, certainly a tax upon purchasers of tickets to a football game cannot be invalid as imposing a burden upon the operations of the State Government.

If the Georgia and Tech Athletic Associations competed only with each other or with other State institutions, in public football exhibitions, there would still be no reason, in my opinion, for a holding that they could not be required to collect an admissions tax from purchasers of tickets to them.

When it is considered that hundreds of athletic associations of colleges and universities not conducted by States are engaged in these competitions for public favor, and that their spectators are subject to the same kind of tax, and when it is further considered that such athletic associations take part in the very games Georgia and Tech conduct, and part of the proceeds goes to them, the claim of governmental immunity from a tax which falls uniformly on all colleges taking part in this spectacular seasonal bid for public patronage and favor, seems to me strained and farfetched indeed.

I respectfully dissent.

---

[9] Texas Co. vs. Carmichael, 13 Fed. Sup. 246; Therrell vs. Commissioner, 88 Fed. (2d) 872.

445

Extract from the Minutes of December 18, 1937

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, MARION E. ALLEN, COLLECTOR, ETC., SUBSTITUTED IN PLACE OF W. E. PAGE, COLLECTOR, ETC., DECEASED

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

HUTCHESON, Circuit Judge, dissenting.

United States of America, United States Circuit Court of Appeals, Fifth Circuit

Clerk's certificate

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 430 to 457 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8466, wherein W. E. Page, Collector of Internal Revenue for the District of Georgia (Marion H. Allen, Collector, etc., substituted in place of W. E. Page, Collector, etc., deceased), is appellant, and Regents of the University System of Georgia is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 429 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of March, A. D., 1938.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.
By E. WENDLING,
Deputy Clerk.

(Supplemental transcript of record)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

United States Circuit Court of Appeals, Fifth Circuit

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, APPELLEE

Motion of appellee to have Marion H. Allen substituted for W. E. Page, deceased

Filed September 27th, 1937

Come now Regents of the University System of Georgia, appellee in this case, and respectfully show to the Court the following:

1. Within six months next preceding the filing of this application the appellant herein, W. E. Page, has departed this life.

2. Marion H. Allen has been appointed Collector of Internal Revenue of the Atlanta, Georgia, District, and is now fulfilling his duties as such.

3. Appellee desires, pursuant to 28 U. S. C. § 780, to substitute Marion H. Allen in place of W. E. Page.

4. Appellee further shows that the policy of attempting to enforce the Federal Amusements Tax on admissions charged to athletic contests given by appellee is a policy established by the Commissioner of Internal Revenue, and is under departmental practices and regulations binding on all Collectors.

5. Appellee therefore says that Marion H. Allen is required to follow said policy, and hence adopts the attitude of his predecessor and will proceed to enforce said policy with respect to applying the Federal Amusements Tax to the said admissions.

Wherefore, appellee prays that the said Marion H. Allen be substituted in place of the said W. E. Page, herein, and the Court permit this cause to be continued and maintained with the said successor in office so substituted.

(Signed) M. J. YOEMANS,
Attorney General of the State of Georgia.
(Signed) MARION SMITH,
Special Assistant Attorney General of the State of Georgia.
(Signed) M. E. KILPATRICK,
Special Assistant Attorney General of the State of Georgia.

United States Circuit Court of Appeals, Fifth Circuit

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, APPELLEE

Order to show cause on motion of appellee

Filed September 27, 1937

The application of the appellee herein to have Marion H. Allen substituted in place of W. E. Page, having been filed and presented to the Court; it is now ordered that the said Marion H. Allen answer said application and show cause why he should not be so substituted.

The Court sets this application for hearing before the Court at Atlanta, Georgia, on the 11th day of October 1937, at ten o'clock A. M.

Let the answer of the respondent be served upon the counsel for the appellee at least five (5) days in advance of the time set for hearing.

It is ordered that the Marshal of the Northern District of Georgia serve a copy of this order and of the application to substitute the said Marion H. Allen upon the said Marion H. Allen, and make a return of his action to the Court.

(Signed) SAML. H. SIBLEY,
U. S. Circuit Judge.

SEPT. 25, 1937.

Marshal's return on motion to substitute

Filed October 2, 1937

Return on service of writ

No. 8466

UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

I hereby certify and return that I served the annexed Application of appellee to substitute Marion H. Allen on the therein-named Marion H. Allen, Collector of Internal Revenue for Georgia, by handing to and leaving a true and correct copy thereof with Frank B. Boyer, Jr., Chief Deputy Collector, Room 236 P. O. Bldg., personally at Atlanta, Fulton Co., Ga., in said District on the Twenty-eight day of September, A. D. 1937.

(Signed) CHAS. H. COX,
U. S. Marshal.

By (Signed) HENRY H. GREEN,
Deputy.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, APPELLANT

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, APPELLEE

Notice and affidavit of Marion H. Allen in connection with motion of appellee to substitute him appellant

Filed October 5th, 1937

To MARION SMITH, Esq.,
Attorney at Law, Atlanta, Georgia:

Please take notice that the undersigned, Marion H. Allen, United States Collector of Internal Revenue for the District of Georgia, appearing specially for that purpose and not otherwise, will on the 11th day of October 1937, upon the convening of said Court, or as soon thereafter as counsel may be heard, move the Honorable United States Circuit Court of Appeals for the Fifth Circuit at the courtroom of said Court in the United States Court Building at Atlanta, Georgia, to set aside and vacate that certain order made and entered by said Court in the above entitled cause on the 27th day of September 1937, directing the said Marion H. Allen to appear before the Court at Atlanta, Georgia, on the 11th day of October 1937, and answer the application of the appellee, Regents of the University System of Georgia, to have him substituted as the defendant and appellant in the place and stead of W. E. Page, former Collector of Internal Revenue for the said District, who resigned on July 15, 1937, said motion will be made and based upon the following grounds, to-wit:

1. That there is not now and never has been any privity between the said Marion H. Allen and said W. E. Page.

2. That the above entitled action is a purely personal one against the said W. E. Page, wherein the plaintiff appellee seeks to enjoin the commission of acts on the part of the said W. E. Page alleged to be without warranty of law whatsoever and in excess and violation of the duties imposed upon him by law as United States Collector of Internal Revenue for said District.

3. That the bill of complaint herein states no cause of action against the said Marion H. Allen, and that there is not now and never has been any pleading in this action charging him with the commission of the acts set forth in the bill of complaint therein.

4. That there is no statutory or other warrant in law for substituting him in the place and stead of the said W. E. Page as the defendant appellant in this action or for subjecting him to the consequences of the judgment or decree heretofore entered therein on

the 14th day of January 1937, in the District Court of the United States for the Northern District of Georgia, Atlanta Division, against the said W. E. Page as defendant, or to the consequences of any judgment that may be rendered against him or his personal representatives therein, and in this connection that he is not now and never has been one of the personal representatives of the said W. E. page, deceased.

5. Specifically that Section 7080 of Title 28 of the Judicial Code does not authorize such substitution.

6. That the above entitled Court is without jurisdiction or power to require the said Marion H. Allen to appear in this action or to require that he be substituted as the defendant appellant therein in the place and stead of the said W. E. Page, deceased.

This motion will be made upon the transcript of record in this action; the motion of the appellee Regents of the University of Georgia filed herein on the 27th day of September 1937, praying for the substitution of the said Marion H. Allen as the defendant appellant in the place and stead of the said W. E. Page; said order entered herein on the 27th day of September 1937, directing the said Marion H. Allen to answer said application and to show cause why he should not be so substituted; and the affidavit of the said Marion H. Allen attached hereto and made a part hereof.

(Signed) LAWRENCE S. CAMP,
United States Attorney.
(Signed) M. NEIL ANDREWS,
Assistant United States Attorney.

I have this day delivered the original of the foregoing notice and attached affidavit to Marion Smith, Counsel for Appellee, Regents of the University System of Georgia.

This 5th day of October 1937.

(Signed) M. NEIL ANDREWS,
Assistant United States Attorney.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, APPELLANT

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, APPELLEE

GEORGIA,
Fulton County, ss:

Before me, the undersigned attesting officer, personally appeared Marion H. Allen, who, being duly sworn, deposes and says:

1. That he is now and ever since the 16th day of July 1937, has been the duly appointed, qualified, and acting United States Collector of Internal Revenue for the District of Georgia; that he assumed the duties of his office on the 16th day of July 1937.

2. That at all of the times mentioned in plaintiff's complaint, from and after the 20th day of June 1933, and up to the 15th day of July 1937, the defendant and appellant in the above entitled action, W. E. Page, was the duly appointed, qualified and acting Collector of said District; that the said W. E. Page resigned on the last mentioned date.

3. That the above entitled action is one of a civil nature in equity, commenced in the District Court of the United States for the Northern District of Georgia, Atlanta Division, and was instituted by the Regents of the University System of Georgia against the said W. E. Page, during his lifetime and while he was holding the office of such Collector.

4. That by their complaint in said action, the complainants sought to enjoin the commission of acts by the said W. E. Page alleged to be beyond the scope of his official duties as such Collector and without warrant of law, in this that the act of Congress under which he proposed to do such acts was null and void because in contravention of the Tenth Amendment to the Constitution of the United States.

5. That on January 14, 1937, during the lifetime of the said W. E. Page and after a trial had in said cause, the said United States District Court entered its final decree against the said Page enjoining and restraining him from the performance of said acts.

6. That in his lifetime, on to-wit, April 3, 1937, and within the time allowed by law, the said W. E. Page as such defendant only appealed to this Court from the said judgment, and in all respects perfected said appeal to and including the filing of the transcript of record on appeal in this Court on the 21st day of May 1937.

7. That there is not now and never has been any privity between your affiant and the said W. E. Page, and that your affiant is not now and never has been one of the personal representatives of the said W. E. Page, and that the appellee does not seek to have him substituted in such capacity.

MARION H. ALLEN.

Sworn to and subscribed to before me this 4th day of October, 1937.

[SEAL] R. S. MOONEY,

Notary Public, Georgia, State at Large.

Extract from the Minutes of October 11, 1937

No. 8466

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

Order substituting Marion H. Allen, Collector, etc., in place of W. E. Page, deceased

This cause came on this day to be heard upon the motion filed by appellee to have Marion H. Allen, Collector of Internal Revenue for the District of Georgia, substituted as appellant in the place and stead of W. E. Page, Collector, etc., deceased, and on the order of this Court to show cause thereon;

Present: Marion H. Smith, Esq., Counsel for Appellee, Mover; Carlton Fox, Special Assistant to the Attorney General, Counsel for Respondent.

Whereupon, after hearing the oral response of counsel for Marion H. Allen, Collector, etc., to said motion in which response it was agreed that the statements of fact in the motion to substitute were correct, and after arguments of counsel for both parties, Marion H. Allen, Collector, etc., objecting to being made a party;

It is now ordered by the Court that the said Marion H. Allen, Collector of Internal Revenue for the District of Georgia, be, and he is hereby, ordered substituted as appellant in the above entitled and numbered cause, in the place and stead of W. E. Page, Collector, etc., deceased.

United States of America, United States Circuit Court of Appeals, Fifth Circuit

Clerk's certificate

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 11, inclusive, contain a true copy of the motion of appellee to have Marion H. Allen substituted for W. E. Page, deceased; order to show cause on motion of appellee; Marshal's Return on motion to substitute; notice and affidavit of Marion H. Allen in connection with motion of appellee to substitute him appellant, and order substituting Marion H. Allen, Collector, etc., in place of W. E. Page, deceased, which were inadvertently omitted from the certified transcript of the record in case No. 8466, wherein W. E. Page, Collector of Internal Revenue for the District of

Georgia (Marion H. Allen, Collector, etc., substituted in place of W. E. Page, Collector, etc., deceased), is appellant, and Regents of the University System of Georgia is appellee, as the same now remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the city of New Orleans, Louisiana, in the Fifth Circuit this 14th day of March, A. D. 1938.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.
By E. WENDLING,
Deputy Clerk.

No. 8466

Circuit Court of Appeals, Fifth Circuit

W. E. PAGE, COLLECTOR OF INTERNAL REVENUE
v.
REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

Stipulation

Whereas the Government is about to apply to the Supreme Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the above action entered on December 18, 1937, affirming the judgment of the District Court of the United States for the Northern District of Georgia entered on January 4, 1937 (reported in 18 Fed. Sup. 762); and,

Whereas the Clerk of the Circuit Court of Appeals for the Fifth Circuit has failed to certify as a part of the record in said case the opinion and judgment of the said Circuit Court of Appeals rendered on the former appeal on January 20, 1936, and reported Sub. Nom. Regents of University System of Georgia v. Page, numbered 7784, 81 Fed. (2d) 577.

Now, therefore, it is stipulated and agreed by and between the attorneys for the respective parties to said action that the said opinion and judgment, a copy of which is hereto attached, be made a part of the record in said action on petition of the Government to

the Supreme Court for certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit entered on December 18, 1937.

March 14, 1938.

LAWRENCE S. CAMP,
U. S. Atty.,
M. NEIL ANDERSON,
Attorneys for Appellant.
M. J. YEOMAN,
Attorney General,
State of Ga.
MARION SMITH,
M. E. KILPATRICK,
Special Asst. Attys. General,
State of Ga.,
Attorneys for Appellee.

Circuit Court of Appeals, Fifth Circuit

No. 7784

REGENTS OF UNIVERSITY SYSTEM OF GEORGIA

v.

PAGE

Jan. 20, 1936

Appeal from the District Court of the United States for the Northern District of Georgia; E. Marvin Underwood, Judge.

Suit for injunction, declaratory judgment, and for general relief by Regents of the University System of Georgia against W. E. Page, Collector of Internal Revenue. From a decree dismissing the bill (10 F. Supp. 901), the plaintiff appeals.

Reversed and remanded for further proceedings not inconsistent with opinion.

Marion Smith and M. E. Kilpatrick, both of Atlanta, Ga., for appellant.

M. H. Eustace, Sp. Asst. to Atty. Gen., and M. Neil Andrews, Asst. U. S. Atty., of Atlanta, Ga., for Appellee.

Before FOSTER and HUTCHESON, Circuit Judges, and HOLMES, District Judge.

HOLMES, District Judge.

This suit in equity was commenced in the District Court of Northern District, by the Board of Regents of the University System of Georgia against the Collector of Internal Revenue to restrain the collection of taxes upon the payment of admissions to athletic games, the proceeds of which inure wholly to the Georgia School of Technology, branches of said system. The appellant was created by an

t of the Legislature of Georgia, in 1931 (Laws Ga. 1931, p. 20) r the purpose of having supervision of the public higher institu-ns of learning in the state, among which were said University and hool. From the bill of complaint, its amendments, and exhibits, appears that during the time involved in this controversy athletic mes or exhibitions, participated in by students, were held upon e athletic fields of each of said institutions. The public was ad-tted to such contests upon payment of the prescribed price of ad-ssion; but whether the amount of admission tax imposed by section 0 of the Revenue Act of 1926, 44 Stat. 91, as amended by section 1 of the Revenue Act of 1932, 47 Stat. 271, was added to the price, a disputed issue to be determined from the amended petition and exhibits. Each admission ticket had printed on its face the price ereof, the amount of federal tax, and the total. The full amount own on the face of each ticket was collected from the purchaser. n the back of each ticket was printed the following: "The Uni-rsity of Georgia, being an instrumentality of the government of e State of Georgia, contends that it is not liable for any admission x. The amount, stated as a tax is so stated because the University required to do so by Treasury regulations pending a decision as its liability in this respect. This amount is collected by the Uni-rsity as a part of the admission and will be retained as such unless is finally determined that the University is itself liable for the tax," e same notice, except for the name "School of Technology," being aced on tickets of the School of Technology.

The Commissioner of Internal Revenue having ruled that state iversities must collect the tax on admissions to football games, e appellant made a return of admission so collected, paid an nount thereon as a tax to the collector for the proper district uch amount not being involved in the present suit), and then ed a claim for refund to cover the amount, but the claim was nied on the ground, among others, that the tax had not been posed on the claimant, but on others from whom the admissions ere collected, and that, not being the taxpayer, appellant could t contest the payment. Warrants of distress and notices of levy ving been served by appellee upon the appellant for subsequent xes, alleged to have been collected during the months of Septem-r and October 1934, from the sale of admissions to games played the University of Georgia and the School of Technology, and per cent. of the amounts so collected and deposited in local banks ving been levied upon by the collector, the appellant filed its bill aying that the appellee be restrained from proceeding further th said attempt to collect said taxes, for a declaratory judgment at no taxes were due, and for general relief.

The court below issued its rule to show cause why the relief ayed for in the bill should not be granted, to which appellee sponded by filing a motion to dismiss the bill. This motion as sustained and a decree of dismissal followed, the court holding,

as contended by appellee, that an injunction is prohibited by section 3224 of the Revised Statutes (26 U. S. C. A. Sec. 1543); that the United States, which is the real party in interest, has not consented to the determination of the question involved by declaratory judgment or decree; that the promotion of athletic games where admission fees are charged is not an essentially governmental function; and that it was not necessary to decide whether the state could be required to act as agent to collect the tax since it had voluntarily done so.

The contentions of appellant are that it is a department of the state government, performing a sovereign function; that the University of Georgia and School of Technology have as parts of their educational curricula athletic departments for the instruction of their students in physical training and education; that the athletic events for which the public is charged admission, which include athletic contests between students of the University of Georgia, the School of Technology, and other colleges, are parts of their educational program; that all funds derived from the sale of such admissions are the property of appellant; and that such admissions are exempt from the payment of the federal admissions tax. The appellant further claims that the amounts for which warrants of distress have been issued are not for taxes assessed against a taxpayer, but for items of a debt owing by an alleged agent; that the money or choses in action which have been levied upon by distrain are not the property of the taxpayer; that the United States government has no lien thereon and no right to seize it by summary process; and that section 3224 of the Revised Statutes does not apply because of the special circumstances which call peculiarly for the interposition of equitable remedies in order to avoid irreparable injury.

(1) We think the court erred in holding that the appellant had voluntarily acted as agent of the federal government in collecting the taxes. If the appellant acted as agent, it did so under coercion brought about by the fear of being mistaken in its expressed opinion that it could not be required to collect taxes for the federal government, and that no taxes were due, because the exhibitions, admissions to which are sought to be taxed, were governmental functions of the state which the United States were without power to tax. The conduct of law-abiding citizens, relying upon constitutional rights but at the same time giving respectful though unwilling obedience to an act of Congress believed to be inapplicable or unconstitutional, should not be distorted into a voluntary assent to the very application of the statute which is being protested against and emphatically challenged. While vigorously denying at all times that any admission tax is due, the appellant first paid it and sought to recover it through administrative channels. This effort failed because the tax payable on admissions is an excise which is added to the price of admission and paid by the purchaser of the ticket. In the absence of a showing that the burden of the taxes was actually borne by it, appellant has

no interest in the subject-matter of the controversy and cannot recover either by administrative claim for refund or action at law. United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859; Shannopin Country Club v. Heiner (D. C.), 2 F. (2d) 393; Lafayette Worsted Co. v. Page (D. C.), 6 F. (2d) 399, 400; Bunker Hill Country Club v. United States (Ct. Cl.), 9 F. Supp. 52; Wourdack v. Becker (C. C. A.), 55 F. (2d) 840, certiorari denied 286 U. S. 548, 52 S. Ct. 501, 76 L. Ed. 1285. The admission tax statute (44 Stat. 91, Sec. 500, as amended) provides that the tax is "to be paid by the person paying for such admission." It further provides (44 Stat. 9, Sec. 2) that "the term 'taxpayer' means any person subject to a tax imposed by this Act."

The only other recourse, except the one followed by appellant, was to disregard the law as construed by administrative officers, and to fail or refuse to comply with it and regulations promulgated thereunder by the Commissioner of Internal Revenue. This would have involved financial hazards and risks of criminal prosecutions which no prudent, law-abiding citizen should be required to incur. See section 500 (d) of the Revenue Act of 1926, 44 Stat. 91; section 3176, Revised Statutes, as amended by section 1103 of the Revenue Act of 1926, 44 Stat. 112; section 619 (d) of the Revenue Act of 1928, 45 Stat. 878; sections 502 (d) 1114, and 1123 of the Revenue Act of 1926, 44 Stat. 93, 116, 121; and section 3184 of the Revised Statutes of the United States (26 U. S. C. A. Sec. 1545). The most pertinent provisions thereof are the following:

Section 55 (d). "Whoever sells an admission ticket or card on which the name of the vendor and price is not so printed, stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100.00." 44 Stat. 91, 92.

Section 1114 (b). "Any person required under this Act to collect, account for, and pay over any tax imposed by this Act, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition *ot* other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution." 44 Stat. 116.

Section 1114 (f). "The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 44 Stat. 116, 117.

The course taken by appellant seems to us most appropriate. The money was collected by the respective athletic departments under an agreement with the purchasers that, if no tax was due by the University or School of Techonology, the amounts so collected

should be added to the price of admission and retained by the appellant. There was nothing unfair or illegal about such an agreement. It was one of which the United States could not reasonably complain. If the tax was due by appellant or it was legally required to collect the same, it is the duty of the collecting agent to pay it over; if the admissions were immune from federal taxation, there was no valid agency and certainly no obligation to pay anything over to the appellee. We find nothing in the conduct of the Board of Regents to estop it from standing upon its constitutional rights and asserting the invalidity or inapplicability of the alleged tax.

(2) Let us now look at the remedy pursued by, and inquire what remedy is available to, appellee. If his contention is correct, the appellant voluntarily acted as agent in the collection of the tax and became the debtor of the United States. The money collected does not belong to the Government; the title to it is in appellee. Nevertheless, treating the amounts claimed to be due as a tax, the Collector of Internal Revenue prepared and filed returns on behalf of appellant's athletic departments and, thereafter, admissions taxes in the respective amounts were duly assessed against them. Appellee then gave notice to and made demand of the respective departments for the payment of the admissions taxes so assessed on account thereof. Upon failure of such departments to pay as demanded, appellee issued his warrants of distraint, and on October 24, 1934, levied upon the bank accounts in which were deposited the funds alleged to have been collected as and for the tax on such admissions, and filed notices of liens thereon. As the appellant is not the taxpayer but merely an alleged debtor for money had and received (United States v. Johnston, 268 U. S. 220, 226, 45 S. Ct. 496, 69 L. Ed. 925), if the appellee is correct in his contention that the appellant voluntarily acted as agent in the collection of the admission taxes, the question immediately presents itself whether the collection of a debt against one other than a taxpayer may "be enforced through the secret findings and summary action of executive officers." Penalties against third parties, not taxpayers, may not be so enforced. Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; Fontenot v. Accardo (C. C. A. 5) 278 F. 871; Ledbetter v. Bailey (D. C.) 274 F. 375, 382; Middleton v. Mee (D. C.) 277 F. 492, 499; Pool v. Walsh (C. C. A.) 282 F. 620; Thome v. Lynch (D. C.) 269 F. 995; Long v. Rasmussen (D. C.) 281 F. 236; Trinacia Real Estate Co. v. Clarke (D. C.) 34 F. (2d) 325; Livingston v. Becker (D. C.) 40 F. (2d) 673; Lion Coal Co. v. Anderson, Collector (C. C. A.) 62 F. (2d) 325; Hubbard Inv. Co. v. Brast (C. C. A.) 59 F. (2d) 709, 710. The power of Congress to provide for the collection of admissions taxes by assessment and warrant of distraint against the appellant may be conceded, provided the business engaged in is not an essentially governmental function; but there is no clear statutory authority for so doing, as in section 280 of the

enue Act of 1926, 44 Stat. 61, dealing with the analogous liability
a transferee of the assets of a taxpayer. Phillips v. Commis-
ner of Internal Revenue, 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed.
).

3–5) In the present case, there is no special statute which author-
the assessment by the Commissioner against the appellant or its
nches of admissions tax which it may have collected, and none
ch authorizes the collection thereof by seizure and sale of appel-
's property under warrant of distraint. The assessment in this
by the commissioner was evidently made under section 3176
Revised Statutes, as amended by section 619 (d) of the Revenue
of 1928, c. 852, 45 Stat. 791 (U. S. C., Supp. VII, title 26, Sec.
4). The statute relied upon to authorize distraint for collection
dmissions tax is section 1109 of the Revenue Act of 1926, 44 Stat.
No Reference is made to admission taxes either in said section
3 of Revised Statutes, as amended, or in said section 1109 of the
enue Act of 1926; but it is not necessary for us to construe these
utes because (if it be conceded that assessment and collection
summary process may ordinarily be made), nevertheless, we are
pinion that appellant has stated a case for equitable relief. As-
ing in the bill that it is exempt from the tax, and the duty to
ect it, for the reasons stated; and being unable to pay the tax
sue for its recovery, or otherwise to test its liability with refer-
e thereto—the appellant is entitled to equitable relief by injunc-
to prevent the threatened sale of its property for a tax it does
owe or for a debt which it disputes and has never had an op-
tunity to deny in court. The enactment of the Act of March 2,
, 14 Stat. 475, which became Rev. St. Sec. 3224 (26 U. S. C. A.
1543), was merely declaratory of the prior rule that courts of
ty will not restrain in the collection of a tax upon the sole
und of its illegality. The rule is not absolute, and is inappli-
e in extraordinary and exceptional circumstances. The absence
plain, adequate, and complete remedy at law to pay the illegal
and sue to recover it raises an independent ground to support
nctive relief in equity. Such ancient equitable jurisdiction was
abrogated by the above statute which is construed in harmony
h the former equitable doctrine. Miller v. Standard Nut Mar-
ne Co., 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422.

6, 7) The petition alleges the incorporation of appellant as a gov-
mental instrumentality for educational purposes; the promotion
physical training as an integral part of its educational activities,
uding intercollegiate athletic contests, such as football; and its
ection of fees for admission to such athletic contests; but it denies
it "collected any tax for the defendant or for the federal gov-
nent at any time." There is no averment in the petition which
ressly or impliedly traverses these allegations, particularly the
that it has collected no tax for the federal government. It is
tended that the foregoing averments, and others of similar im-

port set forth in the petition are conclusions of law and not allegations of fact. We do not so construe them. We realize that it is often difficult to distinguish in pleadings between allegations of fact and conclusions of law; and we are mindful of the rule that, in case of doubt or ambiguity, the petition should be construed most strongly against the pleader; but we find therein no admission of having collected, or of liability to collect, the tax, and no allegation of conduct on the part of appellant or its branches which estops them from denying having voluntarily acted as agent of the federal government in the collection thereof. It is further repeatedly alleged in the petition that in collecting the admission fees the Board of Regents was acting for the state of Georgia in performing a purely governmental function, namely, the education of youth. We are unable to say, from other allegations in the petition or from common knowledge, that these are either mere conclusions of law or erroneous statements of fact. They are clearly intended as factual averments. The language of the pleader is positive and unambiguous. We think the issues as to the collection of taxes, the governmental character of the exhibitions, and the incidental relation of the fees charged for admissions thereto, should be met by an answer to the petition. The plaintiff is required to make only a short and simple statement of the ultimate facts upon which relief is asked, omitting any mere statement of evidence. Equity Rule 25, 28 U. S. C. A. following section 723. General certainty is sufficient. It is not necessary to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. St. Louis v. Knapp, S. & Co., 104 U. S. 658, 661, 26 L. Ed. 883.

(8) According to the contention of appellee, the courts are closed to appellant, in most difficult circumstances. It must either surrender its claims of immunity from federal taxation or incur the risk of committing a felony through its officers or employees. It cannot pay the alleged tax and seek a refund, because the burden of payment is borne by the purchasers of the tickets. For the same reason it cannot recover in an action at law. Yet it is clear from any view of the case that appellant itself owes no tax. Its sole liability, if any, is a duty to collect and faithfully account for it. It denies having made any collection thereof, while admitting having set aside out of its admission fees an amount, at least, equal to the taxes claimed. The motion to dismiss admits every allegation of fact in the petition which is well pleaded. Like a demurrer, the motion must be based entirely upon facts stated in the bill of complaint. It cannot invoke in its support any fact whatever which is not contained therein, except one of which the court takes judicial knowledge.

(9, 10) We deem it premature at this time to make any announcement on the asserted claim of liability for the tax or obligation to collect it. A constitutional question of great importance is involved. The correct answer to it is more aptly to be found in a painstaking examination of the facts and circumstances in evidence

than in hairsplitting technicalities of pleading, however necessary such rules may be ordinarily. The law arises out of the facts in all cases, but, in determining what instrumentalities of a state are exempt from taxation by the federal government, the maxim requires special emphasis. Legal formulas are helpful to classify state activities, but in close cases it becomes necessary to examine the particular facts to determine whether the special instrumentality falls within the category of private business subject to tax or governmental function exempt therefrom. Under our dual system of constitutional government the limitation upon the taxing power must be given a practical construction so as not "to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it." Metcalf & Eddy v. Mitchell, 269 U. S. 514, 524, 46 S. Ct. 172, 174, 70 L. Ed. 384; South Carolina v. United States, 199 U. S. 437, 461, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Flint v. Stone Tracy Co., 220 U. S. 107, 172, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, see also, Fox Film Corporation v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307; Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338; Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717; Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601, 75 L. Ed. 1277.

We think the motion to dismiss should have been overruled, a preliminary injunction issued, an answer required to be filed, and the case heard upon the merits. Pending such hearing an interlocutory injunction should issue restraining the defendant from attempting to collect the alleged taxes, debt, or penalties, except by due proceedings in a court of competent jurisdiction.

Reversed and remanded for further proceedings not inconsistent with this opinion.

HUTCHESON, Circuit Judge (dissenting).

As stated in the majority opinion, plaintiff's suit was "in equity, to restrain the collection of taxes upon the payment of admissions to athletic games." This being so, I think it inescapable that its maintenance was forbidden by section 3224, Rev. Stat., U. S. C. A., title 26, Sec. 154 (now 26 U. S. C. A., Sec. 1543), and that the District Judge was right in refusing the restraining order and dismissing the bill.

I cannot agree with the majority that there are any special circumstances in this case which, within Miller v. Standard Nut Margarine Co., 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422, take it out of the operation of that statute. Especially can I not agree that appellant's situation with reference to the admissions taxes it collected from its patrons, but did not return and pay over, prevents its being distrained for them.

The view of the majority that it is such a case proceeds, I think, from two erroneous assumptions. The first is that appellant is not, as to the admissions taxes collected, obligated to make returns as to,

and account for, and pay them over as a taxpayer. The second is that it may not pay them over and then sue to recover them back.

The statutes and regulations make it clear, I think, that appellant is, as to these admissions taxes collected, a taxpayer to the extent, at least, that as a taxpayer it is obligated to make returns, as a taxpayer it must pay over what it has collected, and as a taxpayer it is subject to be distrained for these collections, if it fails to pay over.

Section 502 (a), (c), and (d), 44 Stat. 93, U. S. C. A., title 26, Sec. 873; section 1102 (a), 44 Stat. 112, U. S. C. A., title 26, Sec. 1254; section 3176, U. S. C. Supp. VII, title 26, Sec. 1524, 45 Stat. 878; section 3184, U. S. C. A., title 26, Sec. 104 (now 26 U. S. C. A., Sec. 1545), make provision for collectors of admissions taxes making returns of and paying the taxes they collect. They authorize the commissioner or a collector to make the return, in case the collector of admissions fails to do so. They authorize the commissioner to determine and assess all taxes on returns so made and further authorize the collector to collect these taxes as other taxes.

The Regulations, Art. 43, provide that every individual, corporation, or association receiving any taxable payment for admissions must collect the tax from the person making such payment at the time the payment is made. Article 54 provides that the person making payment of the taxes so collected may file claim for the refund of the taxes. There is a special provision that a club, which seeks refund of the amount of taxes collected by the club from its members, should make its claim so as to show that it does so with authority. These provisions leave no room for doubt, I think, that when the association collected these admissions it did so under the obligation to return them and pay them over. They leave no doubt that it has the right to file a claim for refund upon the ground it urges that the tax is in effect a tax upon the state and therefore is not collectible, and that by the agreement on the tickets its patrons have assigned the sums in controversy to it to have and keep them as its own, if the United States is not entitled to hold them. United States v. Johnston, 268 U. S. 220, 45 S*t*. Ct. 496, 69 L. Ed. 925, cited by the majority as holding that appellant is not a taxpayer, does not, I think, so hold. The precise question was not before that court. It decided only that one who had collected admissions taxes had not collected them and did not hold them as agent of the United States so as to be guilty of embezzlement in not paying them over. It held that such a collector was a debtor, not a bailee; that the money for the tax was not identified at the outset, but was paid in with the price of the ticket, and nothing in the act required the collector to set up a separate fund in which the part due for admissions taxes should be put. On the question of taxpayer vel non, this that is said in the case, "reports are required only once a month, which does not look as if the Government were dealing with these people otherwise than with others answerable for a tax," indicates that the collector was, rather than that he was not, regarded as a taxpayer. I think it clear that plaintiff

having collected these sums, holds them prima facie at least as to the government, as tax moneys and is subject to pay them over, and upon failure to do so, to distrain for them as tax moneys, so that no injunction suit against their collection can be maintained.

I think it equally plain that appellant has an adequate remedy to pay and recover back.

Bunker Hill Country Club v. United States, 9 F. Supp. 52, and Congressional Country Club v. United States, 44 F. (2d) 266, are Court of Claims opinions in refund suits brought by country clubs to recover back taxes they had collected from their members and had remitted to the collector under statutes requiring them to do so. In both of these cases it was held, against the claim that the tax was unconstitutional, that the tax was a valid charge on the members; that plaintiffs having collected the amounts for their members were "liable for the tax." In both of them the refund was denied, not because plaintiffs had no standing to sue, but because the tax was valid.

Wourdack v. Becker (C. C. A.), 55 F. (2d) 840, does hold that one who, under no obligation or constraint to pay taxes assessed against others, had paid them, was a voluntary payee and could not recover them back. But see Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265, holding that taxes erroneously paid may be recovered back, though there was neither protest nor duress. See, also, our case of White v. Hopkins, 51 F. (2d) 159, holding that for the purpose of suing for a refund, a taxpayer is "One who pays a tax."

In Shannopin Country Club v. Heiner (D. C.), 2 F. (2d) 393, cited by the majority, a District Judge does hold that a country clubs showing only that it has paid sums paid it by its members as taxes on dues, does not make a case for refund. We need not say whether that case was correctly decided, for it is not authority for a case like this, where appellant suing for a refund shows on the face of its claim for it that the money it sued for was, if not due the government as taxes, its own money by agreement of ticket buyers.

I think it plain, then, that the District Judge was right in refusing the temporary injunction. Whether, as the majority hold, the dismissal of the bill was error, because the case should have been held for decision on the merits on its prayer for declaratory judgment, we need not determine, for the Federal Declaratory Act, Jud. Code Sec. 274 (d), as amended by section 405, Revenue Act 1935, 28 U. S. C. A., Sec. 400), does not now extend to controversies with respect to federal taxes.

Instead, then, of reversing the decree and remanding the cause for hearing on the merits, granting an interlocutory injunction meanwhile, I think we should have affirmed the decree throughout.

I therefore dissent.

Supreme Court of the United States

Order allowing certiorari

Filed April 11, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

BLANK

PAGE

BLANK

PAGE

FILE COPY

BLANK

PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	9
Reasons for granting the writ	10
Conclusion	17
Appendix	18

CITATIONS

Cases:	
Helvering v. *Therrell*, No. 128, decided February 28, 1938	15
James v. *Dravo Contracting Co.*, No. 3, decided December 6, 1937	16
La Prade, Ex parte, 289 U. S. 444	13
Lash's Products Co. v. *United States*, 278 U. S. 175	11
Ohio v. *Helvering*, 292 U. S. 360	16
Union Trust Co. v. *Wardell*, 258 U. S. 537	14
United States v. *First Capital Nat. Bank*, 89 F. (2d) 116	12, 13
Statutes:	
Revised Statutes:	
Sec. 3187, as amended by Sec. 1016, Revenue Act of 1934, c. 234, 43 Stat. 253	22
Sec. 3224	22
Sec. 3447 (U. S. C., Title 31, Sec. 203)	11
Judicial Code, Sec. 267	22
Act of February 13, 1925, c. 299, 43 Stat. 936, 941; Sec. 11	22
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 500 (b)	18
Sec. 500 (d)	18
Sec. 502 (a)	19
Sec. 502 (c)	19
Sec. 502 (d)	19
Sec. 1102 (a)	19
Sec. 1114 (e)	20
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 711 (a)	20
Sec. 711 (c)	21
Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 607	21

52660—38——1

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Marion H. Allen, Collector of Internal Revenue for the District of Georgia, substituted by the Circuit Court of Appeals for the Fifth Circuit in the place of W. E. Page, who resigned as such collector during the pendency of this action in the said Circuit Court of Appeals on his appeal, and has since died, prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered December 18, 1937.

OPINIONS BELOW

There are four opinions below. The first is the opinion of the District Court of the United States

for the Northern District of Georgia on the dismissal of the bill of complaint against the former collector, W. E. Page, which is reported in 10 F. Supp. 901; the second, the opinion of the Circuit Court of Appeals for the Fifth Circuit reversing such judgment, which is reported in 81 F. (2d) 577; the third, the opinion of the said District Court on the entry of judgment on remand in favor of the respondent and against the said Page, as such collector, which is reported in 18 F. Supp. 62; and the fourth, the opinion of the said Circuit Court of Appeals rendered December 18, 1937, not yet reported, affirming the last mentioned judgment of the said District Court after the substitution of the incumbent collector, Marion H. Allen, in place of the said Page, after his resignation and decease.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered December 18, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent may maintain a suit to enjoin a collector of Internal Revenue from recovering by distraint admissions taxes imposed by Section 500 of the Revenue Act of 1926 as amended by Section 711 of the Revenue Act of 1932, and collected under its authority from purchasers of

tickets of admission to intercollegiate football games.

2. Whether Section 11 of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 780), permits the substitution of the collector's successor in office as defendant and the continuance of the suit against him.

3. Whether the respondent, or its agents, were engaged in the performance of an essential governmental function in staging intercollegiate football games, in which teams representing the University of Georgia and the Georgia School of Technology participated.

4. If question 3 is answered in the affirmative, then whether the federal admissions tax referred to imposes an unconstitutional burden upon the State of Georgia.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pp. 18–23.

STATEMENT

No returns were filed in respect of the tax imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 (c) of the Revenue Act of 1932 (Appendix, *infra,* pp. 18, 21), on admissions to athletic events held at the University of Georgia and at the Georgia School of Technology during September and October, 1934, the period here in question. Accordingly the then Collector of Internal Revenue for the District of Georgia,

W. E. Page, prepared such returns in the amount of $895.37, admissions tax collected by the University of Georgia Athletic Association on admissions to such events held during that period at the University of Georgia and in the amount of $3,914.63, admissions tax collected by the Georgia Tech Athletic Association on admissions to such events held at the Georgia School of Technology during that time. Neither sum was paid. (R. 329.) The Commissioner of Internal Revenue made assessments against each association in the amount thus returned for it and certified the assessments to the said collector (R. 349–350), who forthwith made demand upon each association for the payment of the amount returned for it, and upon its failure to pay filed a lien, issued a warrant, and caused levy thereof to be made upon the bank account in which the association had deposited and was holding the amount of the tax, so collected and withheld by it, as a special trust for the United States, as required by Section 607 of the Revenue Act of 1934 (Appendix, *infra,* p. 21); and, in addition, the said collector served notice of levy and demand for payment upon each of the banks in which these amounts had thus been deposited. (R. 336–358.)

Thereupon respondent, the Regents of the University System of Georgia (a public corporation entrusted by law with the control and management of these schools) filed its bill of complaint, with a later amendment thereto, against the said Page as

such collector, in the District Court of the United States for the Northern District of Georgia, praying for a judgment declaring that it was immune from the federal admissions tax because it was an agency of the State and was performing an essential governmental function in staging the athletic events in question. It further sought an injunction *pendente lite* against said Page as collector, and against his agents, etc., from proceeding with the collection, and a permanent injunction upon the declaration requested. (R. 1–14; 18–24.) The complaint was, on motion of Page, dismissed for want of equity. (See *Regents of the University System of Georgia* v. *Page,* 10 F. Supp. 901.)

On the Regents' appeal, the judgment of dismissal was reversed by the Circuit Court of Appeals for the Fifth Circuit, Judge Hutcheson dissenting. 81 F. (2d) 577. The decision proceeded upon the premise that the respondent, or its agents, did not voluntarily act as agents for the Federal Government in the collection of the tax; that it was therefore not estopped to assert that the exaction was an infringement of its constitutional exemption from the tax; and that, since it could not maintain an action to recover the tax if paid, because it was not the taxpayer but only the agent of the Government in collection, it was entitled to maintain the bill to restrain collection.

Upon the ensuing trial, the District Court found the facts to be in substance as follows (R. 153–

154): The respondent is a public corporation and instrumentality of the State of Georgia, under whose supervision are its two branches, the University of Georgia and the Georgia School of Technology. At all the times here involved, and prior thereto, there was maintained at each of these schools an athletic association, incorporated under the laws of Georgia, known as the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, which had control, among other things, of intercollegiate contests in football, to which the public was admitted upon the payment of admission charges of varying amounts (R. 150–151). The expenses of physical education and athletic programs at each school were supported in large measure from admission charges to athletic contests; in addition, a small student's fee collected from each student was also used for such purpose, the entire expenses of physical education and athletic programs in each school being met by such admission charges and student fees. During and since the year 1934, each ticket of admission to such athletic events at the University of Georgia contained the following notice (R. 152):

> The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury

> regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

The same appeared on all tickets of admission to athletic contests at the Georgia School of Technology except that the name "School of Technology" was inserted in lieu of the name "University of Georgia"[1] (R. 152). Neither the Regents nor the athletic associations, nor any other branch or instrumentality of the respondent, had made any returns to the petitioner for the period in question of the amount stated on the admission tickets as a tax. Each association kept all amounts so collected separate and apart from all other funds and deposited them in a separate bank account, the amount so collected by the University of Georgia Athletic Association ($895.37) being deposited in the Citizens and Southern National Bank in Athens, Georgia, and that collected by the Georgia Tech Athletic Association ($3,914.63) being deposited in the First National Bank in Atlanta,

[1] This was printed on the back of each ticket. (R. 152.) On the face of each there was printed, in accordance with the requirements of Section 500 of the Revenue Act of 1926, as amended (see Appendix, *infra*, p. 18), the admission price, the amount of the Federal tax, and the total amount of the admission price and tax (R. 193–194); see also Plaintiff's Exhibit 4 (R. 289), and Defendant's Exhibits 6–A and 6–B (R. 344, 345).

Georgia. No part of these sums has ever been paid to the said Page as collector or to the United States (R. 150–151); and, upon such failure to make the returns and pay the taxes on said admissions, the said collector made returns and assessments in said amounts against the associations and proceeded to their collection by distraint.

The District Court construed the decision of the Circuit Court of Appeals to hold that the bill of complaint stated a cause of action and that judgment should go for the respondent if the allegations of the bill were established, as he found them to be. (R. 155–156.) The court accordingly entered a final decree restraining Page, his agents, etc., from further proceeding under the levies and warrants aforesaid and cancelling them and the liens thereby created.

The Collector appealed from this decree. During the pendency of the appeal, the defendant Page resigned and, before the argument, died. Over the objection of Government counsel, the court ordered his successor, Marion H. Allen, to be substituted as the appellant in the action. The court then affirmed the judgment, Judge Hutcheson dissenting. The court refused to reconsider the question of the right of the respondent to maintain the suit for injunctive relief. Its decision on the merits is predicated upon the view that the staging of intercollegiate football games is an essential governmental function. Judge Hutcheson premised his dissent upon two propositions: (1) that

the staging of such spectacles is not an essential governmental function, and (2) that, even if it were, the requirement that the athletic associations which conduct the enterprises collect a 10 percent tax on admissions does not impose an unconstitutional burden on the State.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that, despite R. S. 3224, the respondent could maintain a suit to enjoin a Collector of Internal Revenue from recovering by distraint admissions taxes imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and collected by it or its agents or instrumentalities from purchasers of tickets of admission to intercollegiate football games.

2. In holding that respondent had standing to contest the validity of the tax.

3. In holding that Section 11 of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 780), authorizes the substitution of the collector's successor in office and the continuance of the suit against him.

4. In holding that the respondent or its agents or instrumentalities were engaged in the performance of an essential governmental function in staging intercollegiate football games in which teams representing the University of Georgia and the Georgia School of Technology participated, and that hence the purchasers of admission tickets were

immune from the tax and it and its agents and instrumentalities not required to pay over to the Government the amounts it or they had collected from such purchasers as tax.

5. In holding that such tax imposed an unconstitutional burden upon the State of Georgia.

6. In reversing the original decree of the District Court of the United States for the Northern District of Georgia dismissing the respondent's bill of complaint for want of equity.

7. In entering its order substituting Marion H. Allen, the incumbent collector, in the place of W. E. Page, the former collector, against whom the suit was instituted, upon his resignation and death during the pendency of the action in the court below on the second appeal.

8. In affirming the decree of the District Court, entered on remand, enjoining the collection of the tax and cancelling the levies, warrants of distraint, and the liens thereby created.

9. In holding that the findings support the decree of the District Court, and that there is evidence to sustain it.

REASONS FOR GRANTING THE WRIT

The present case involves important questions both of jurisdiction and practice and of constitutional law.

I

1. The holding that respondent may maintain a suit to enjoin the collection of the admissions tax

constitutes a novel departure from the rule embodied in R. S. Section 3224, prohibiting suits to restrain the assessment or collection of a federal tax. The premise for this holding, as stated by a majority of the court on the prior appeal (81 F. (2d) 577), was that no suit for refund could be maintained by respondent, as it is not the taxpayer. Two observations may be made with respect to this assumption. First, one who is not the taxpayer, but merely a collecting agency, is entitled to no greater standing in equity to restrain the collection of a tax than at law to seek its refund. Second, if respondent is not the taxpayer, no burden in the constitutional sense is imposed upon it in requiring it to collect and pay over an admissions tax on spectators. See p. 16, *infra*.

The situation is not changed by the notation on the tickets that the amount of the tax is collected as part of the admission charge and will be retained unless it is determined that the University is liable for the tax. (R. 289, 344–345.) If the amount of the tax is in fact part of the admission charge, a larger tax was due and should have been collected on each admission. Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175. If the University merely attempted to secure from the spectators a relinquishment to it of their right to contest the tax, the attempt may be regarded as the assignment of a claim against the United States, forbidden by R. S. 3477, U. S. C., Title 31, section

203; and if not so forbidden the University would simply be entitled to assert the rights of the spectators in a proceeding appropriate to a claim by them, not in a suit for injunction.

2. Apart from the question of the application of R. S. 3224, there is presented the question whether one who collects a tax as agent of the United States may enjoin a proceeding by the Collector to secure possession for the United States of the amount collected. Indeed, the standing of respondent is even more remote than suggested, since not the respondent, but the two athletic associations, themselves incorporated, collected the tax, deposited it, and were assessed therefor as collecting agents (R. 150–151, 152–153). In these circumstances the respondent cannot be heard to assert ownership in itself as against the United States. Thus in *United States* v. *First Capital Nat. Bank,* 89 F. (2d) 116 (C. C. A. 8th), where the United States sued to recover the amount of admission taxes deposited with a bank by the athletic association of the University of Iowa, and the bank set up the claim of the university to the fund, the court held that since the athletic association collected the tax as agent of the United States with the acquiescence of the university, neither the association nor the university had standing to assert a right in itself to the fund. In the present case the only additional circumstance is the notation on the reverse of the tickets; but, as already observed, that nota-

tion has the effect either of increasing the tax due, or of allowing respondent to prosecute the claim of spectators in an appropriate action. In no event does the notation alter the essential fact that the associations, with the acquiescence of the respondent, collected an amount stated on the tickets to be a tax and hence, under the statute, required to be paid over to the United States. Respondent stands in no better position than the associations. Collecting agents cannot, in an effort to challenge the validity of the tax collected by them, destroy the relation between themselves and the Government by making contracts conferring claims to the fund on another. It is submitted, therefore, that the decision below cannot be reconciled with the decision in the *First Capital Nat. Bank* case, *supra.*

3. A final procedural question is raised by the substitution of the successor collector on appeal, after the resignation and death of his predecessor, the original defendant. The power of a Federal court to authorize such substitution was expressly reserved for decision in *Ex parte La Prade,* 289 U. S. 444, 459, the Court stating: "We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved." It is true that there the Court was concerned with the substitution of state officers and pointed out that with respect to Federal officers

Congress "may ordain that they may sue or be sued as representatives of the United States * * *" (p. 458). But nowhere has Congress converted a suit against a collector into one against the United States. The general provision for substitution of Federal officers, found in U. S. C., Title 28, section 780, *infra*, pp. 22–23, does not authorize the substitution of a successor collector for his predecessor in an action for refund. *Union Trust Co.* v. *Wardell*, 258 U. S. 537. There is much less basis for inferring that substitution has been authorized and immunity thereby waived in a suit for injunction, since such a suit against a public officer is traditionally and necessarily regarded as brought against the defendant personally, and since Congress has established through R. S. 3224 a firm rule against enjoining the assessment or collection of a tax. It is submitted, therefore, that the question expressly reserved in the *La Prade* case is presented here, and that the decision of the question by the court below was erroneous.

II

In holding the tax unconstitutional as applied to respondent, the court below has decided a question which is manifestly of general importance. Furthermore, the decision below cannot, we submit, be supported, both because the activity here involved is not an essential governmental function of the State, and because, even if it were, the tax does not lay an unconstitutional burden upon it.

1. That the staging of intercollegiate football games is not an essential governmental function of the State has been amply demonstrated, in our view, in the dissenting opinion of Judge Hutcheson below. It could hardly be supposed that such an activity is one of "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution". *Helvering* v. *Therrell,* No. 128, decided February 28, 1938, p. 4.

A brief résumé of certain salient facts in the present case will bear out the conclusion of Judge Hutcheson that we are here dealing with "gigantic commercial activities." The spectacles involved are staged in two stadiums, each of which has a seating capacity of approximately 30,000 persons (R. 187, 205). The enrollment at the University of Georgia was about 2,400 students, and at the Georgia School of Technology about 2,000 (R. 179, 202). At the University of Georgia there were from 135 to 160 students on the football squad (R. 173) and at the Georgia School of Technology 50 (R. 202). At neither school is participation in football a prerequisite to graduation, and no credit is given therefor toward a degree (R. 164, 171, 172, 202, 227). The receipts of the University of Georgia Athletic Association derived from the sale of football tickets, exclusive of student fees, during the year ended August 31, 1935, were $71,323.27 (R.

268). The receipts of the Georgia Tech Athletic Association derived from football games in the year 1934 were in excess of $127,000 (R. 214, 309), including over $74,000 from sales of tickets (R. 308). It is true that the Athletic Associations have chosen to contribute from their receipts to scholarship and similar funds of the respective schools (R. 182–183, 242), but obviously the disposition which is made of the profits from the activity taxed cannot be determinative of the nature of the activity itself. If the receipts derived by the State of Ohio from the sale of liquor (*Ohio* v. *Helvering,* 292 U. S. 360) had been devoted to paying the salaries of legislators, that fact plainly would not have affected the conclusion of this Court that the activity was not an essential governmental function and could be subjected to tax by the Federal Government.

2. But even if the staging of these contests be deemed an essential governmental function, the tax on admissions thereto does not impose an unconstitutional burden on the State. The tax is laid on the purchasers, not on the athletic associations or the State. The tax is non-discriminatory, being laid generally on admissions to places of amusement. Consequently, even if the tax increased the cost to the State, it would not be invalid. *James* v. *Dravo Contracting Co.,* No. 3, decided December 6, 1937. And in fact the tax cannot be said to be passed on or to increase the cost to the State, as might be true in the case of a tax on the gross receipts of contractors, since it is highly conjectural

to assume that the attendance and receipts at the games are adversely affected by the tax. The effect would seem to be no more direct or substantial than in the case of taxes levied generally upon the citizens of a state.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

MARCH, 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 500. (b) No tax shall be levied under this title in respect of—

(1) Any admissions all the proceeds of which inure (A) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving-picture theater—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual; * * *.

* * * * *

(d) The price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back of that part of the ticket which is to be taken up by the management of the theater, opera, or other place of amusement, together with the name of the vendor if sold other than at the ticket office of the theater, opera, or other place of amusement. Whoever sells an admission ticket or card on which the name of the vendor and price is

not so printed, stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100. (U. S. C., Title 26, Secs. 941–944.)

SEC. 502 (a) Every person receiving any payments for such admission, dues or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

* * * * * *

(c) The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

(d) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. (U. S. C., Title 26, Secs. 955–957.)

SEC. 1102. (a) Every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to

time prescribe. (U. S. C., Title 26, Sec. 960.)

* * * * *

SEC. 1114. * * *

(e) Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy. (U. S. C., Title 26, Sec. 1610.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 711. ADMISSIONS TAX.

(a) Paragraph (1) of Section 500 (a) of the Revenue Act of 1926, as amended, is amended to read as follows:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years

of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscribed for a single admission is less than 41 cents;"

* * * * *

(c) Section 500 of the Revenue Act of 1926, as amended, is amended by adding at the end thereof the following subdivision:

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States)."

* * * * *

(U. S. C., Title 26, Secs. 940, 941.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 07. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so

collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, Sec. 1551.)

Revised Statutes:

SEC. 3187 (as amended by Sec. 1016 of the Revenue Act of 1924, c. 234, 43 Stat. 343). If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. (U. S. C., Title 26, Secs. 1580.)

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

Judicial Code:

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (U. S. C., Title 28, Sec. 384.)

U. S. Code, Title 28, sec. 780, Act of February 13, 1925, c. 229 ,43 Stat. 936, 941:

SEC. 11. ACTION IF FEDERAL, ETC., OFFICER DIES WHILE SUIT PENDING.

(a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

U. S. GOVERNMENT PRINTING OFFICE: 1936

BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and Regulations involved	3
Statement	3
Specification of Errors to be urged	9
Summary of Argument	10
Argument:	
I. The respondent may not maintain a suit to enjoin a Collector of Internal Revenue from recovering by distraint admissions taxes, imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and collected under its authority from purchasers of tickets of admission to intercollegiate football games	17
(a) The bill of complaint states no facts to entitle the respondent to injunctive relief and hence the decree of the District Court granting the motion to dismiss was correct and should not have been reversed	18
(b) One who collects a tax as an agent of the Government may not enjoin the Collector of Internal Revenue from proceeding by distraint to reduce the amount so collected to his possession	26
(c) The respondent could not maintain the suit upon the basis that it had acquired the rights of the individuals who paid admissions taxes	33
(d) If the respondent or the athletic associations did not in fact collect the tax, then it or they had an adequate remedy at law for the recovery of the amounts assessed against them in the event they had paid the same	37
II. Section 11 of the Act of February 13, 1925, does not permit the substitution of the Collector's successor in office as defendant and the continuance of the suit against him	40
III. Intercollegiate football games are not an essential governmental function	46

61606—38——1

Argument—Continued. Page

IV. The admissions tax does not place an unconstitutional burden upon the State, even if imposed with respect to an essential governmental function 57

Conclusion 61

CITATIONS

Cases:

Alabama v. *Arizona*, 291 U. S. 286 60

Alward v. *Johnson*, 282 U. S. 509 ..... 31, 59

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337 27

Bailey v. *George*, 259 U. S. 16 25

Board of Liquidation v. *McComb*, 92 U. S. 531 44

Board of Trustees v. *United States*, 289 U. S. 48 56

Bowers v. *American Surety Co.*, 30 F. (2d) 244 42

Broadway Blending Corporation v. *Sugden*, 2 F. Supp. 837 26

Brushaber v. *Union Pac. R. R.*, 240 U. S. 1 24

Bull v. *United States*, 295 U. S. 247 28

Caledonian Coal Company v. *Baker*, 196 U. S. 432 ..... 43, 44

Calkins v. *Smietanka*, 240 Fed. 138 23

Carleton Dry Goods Co. v. *United States*, not officially reported, published as Treasury Decision 4209, VII–2, Cumulative Bulletins 172, 1928 C. C. H., Vol. III, paragraph 7905 36

Cheatham v. *United States*, 92 U. S. 85 22

Choctaw Cotton Oil Co. v. *United States*, not officially reported, 1931 C. C. H., Vol. III, paragraph 9631 36

City of Seattle v. *Poe*, 4 F. (2d) 276 25

Columbus & Greenv. Ry. Co. v. *Miller*, 283 U. S. 96 27

Cowpens Manufacturing Co. v. *United States*, not officially reported, 1932 C. C. H., Vol. III, paragraph 9406 36

Dalton Foundries v. *United States*, 56 F. (2d) 483 36

Daube v. *United States*, 59 F. (2d) 842 36

Davis v. *Mills*, 194 U. S. 451 29

Dodge v. *Osborn*, 240 U. S. 118 25

Educational Films Corp. v. *Ward*, 282 U. S. 379 56

Ex Parte La Prade, 289 U. S. 444 ..... 41, 43

Fidelity Title & Trust Co. v. *Heiner*, 34 F. (2d) 350 36

Fix v. *Phila. Barge Co.*, 290 U. S. 530 ..... 42, 43

Gouge v. *Hart*, 250 Fed. 802, appeal dismissed, 251 U. S. 542 22

Graham v. *du Pont*, 262 U. S. 234 24

H. M. O. Lumber Co. v. *United States*, not officially reported, 1929 C. C. H., Vol. III, paragraph 9438 ..... 35, 36

Helvering v. *Mountain Producers Corp.*, decided March 7, 1938 ..... 32, 55, 58, 60

Helvering v. *Powers*, 293 U. S. 214 ..... 53, 56

Helvering v. *Therrell*, decided February 28, 1938 48

Hill v. *Wallace*, 259 U. S. 44 24

Houston Street Corp. v. *Commissioner*, 84 F. (2d) 821 28

Cases—Continued. Page

Indian Territory Oil Co. v. *Board*, 288 U. S. 325 56
Irwin v. *Wright*, 258 U. S. 219 43
James v. *Dravo Contracting Co.*, 302 U. S. 134 ..... 31, 58
Lewis v. *Reynolds*, 284 U. S. 281 28
Liggett & Myers Co. v. *United States*, 299 U. S. 383 ..... 31, 59
Lipke v. *Lederer*, 259 U. S. 557 24
Ludwig v. *West. Un. Tel. Co.*, 216 U. S. 146 45
McCray v. *United States*, 195 U. S. 27 26
Martin v. *National Surety Co.*, 300 U. S. 588 36
Massachusetts v. *Mellon*, 262 U. S. 447 60
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514 56
Miami Valley Fruit Co. v. *United States*, 45 F. (2d) 303, certiorari denied, 283 U. S. 841 27
Miller v. *Nut Margarine Co.*, 284 U. S. 498 24
Minnesota v. *Northern Securities Co.*, 194 U. S. 48 60
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373 24
National Bank v. *Commonwealth*, 9 Wall. 353 56
New Jersey v. *Sargent*, 269 U. S. 328 60
New York ex rel. Rogers v. *Graves*, 299 U. S. 401 55
Noble v. *Union River Logging Railroad*, 147 U. S. 165 ..... 44, 45
Ohio v. *Helvering*, 292 U. S. 360 ..... 15, 47, 53
Okla. Gas Co. v. *Russell*, 261 U. S. 290 44
Pacific Whaling Co. v. *United States*, 187 U. S. 447 25
Pennoyer v. *McConnaughy*, 140 U. S. 1 46
Philadelphia Co. v. *Stimson*, 223 U. S. 605 45
Phillips v. *Commissioner*, 283 U. S. 589 22
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 24
Prendergast v. *N. Y. Tel. Co.*, 262 U. S. 43 44
Ralston v. *Heiner*, 24 F. (2d) 416, certiorari denied, 277 U. S. 608 22
Regal Drug Co. v. *Wardell*, 260 U. S. 386 24
Reinecke v. *Peacock*, 3 F. (2d) 583, certiorari denied, 268 U. S. 699 25
Richardson Lubricating Co. v. *Kinney*, 337 Ill. 122 28
School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94 45
Seaman v. *Guaranty Trust Co. of New York*, 1 F. (2d) 391 23
Snyder v. *Marks*, 109 U. S. 189 23
Spofford v. *Kirk*, 97 U. S. 484 35
State Railroad Tax Cases, 92 U. S. 575 25
State v. *Regents of the University System*, 179 Ga. 210, 175 S. E. 567 32
Standard Oil Co. v. *Bollinger*, 337 Ill. 353 28
Stone v. *White*, 301 U. S. 532 28
Thompson v. *United States*, 103 U. S. 480 45
Thornhill Wagon Co. v. *Noel*, 17 F. (2d) 407 26
Tirrell v. *Johnston*, 293 U. S. 533 59
Trinity Farm Co. v. *Grosjean*, 291 U. S. 466 59
Tyler v. *Hand*, 7 How. 573 42

Cases—continued Page

United States v. *American Exchange Irving Trust Co.*, 43 F. (2d) 829 27
U. S., ex rel. Bernardin v. *Butterworth*, 169 U. S. 600 ... 43, 44, 45
United States v. *Erb*, 8 F. Supp. 947 27
United States v. *First Capital Nat. Bank*, 89 F. (2d) 116 .. 27, 30, 34
United States ex rel Girard Co. v. *Helvering*, 301 U. S. 540 .. 28
United States v. *Jefferson Electric Co.*, 291 U. S. 386 28
United States v. *Johnston*, 268 U. S. 220 29
United States v. *Thomas*, 15 Wall. 337 30
Virginia Coupon Cases, 114 U. S. 311 44
Wheeler Lumber Co. v. *United States*, 281 U. S. 572 ..... 31, 58
Willcuts v. *Bunn*, 282 U. S. 216 56

Statutes:

Act of February 8, 1899, c. 121, 30 Stat. 822 42
Act of February 13, 1925, c. 229, 43 Stat. 936:
SEC. 11 (U. S. C., Title 28, Sec. 780) 70
Judicial Code:
SEC. 267 (U. S. C., Title 28, Sec. 384) 70
Revenue Act of 1926, c. 27, 44 Stat. 9:
SEC. 221 28
SEC. 500 (U. S. C., Title 26, Secs. 941–944) 62
SEC. 502 (U. S. C., Title 26, Secs. 955–957) 63
SEC. 1102 (U. S. C., Title 26, Sec. 960) 63
SEC. 1114 (U. S. C., Title 26, Secs. 494, 856, 921, 958, 1047, 1127, 1155, 1610, 1693) 64
Revenue Act of 1932, c. 209, 47 Stat. 169:
SEC. 711 (U. S. C., Title 26, Secs. 940, 941) 65
Revenue Act of 1934, c. 277, 48 Stat. 680:
SEC. 607 (U. S. C., Title 26, Sec. 1551) 66
Revised Statutes:
SEC. 3187 (U. S. C., Title 26, Sec. 1580) 67
SEC. 3220 (U. S. C., Title 26, Sec. 1670) 67
SEC. 3224 (U. S. C., Title 26, Sec. 1543) 68
SEC. 3226 (U. S. C., Title 26, Sec. 1672) 68
SEC. 3228 (U. S. C., Title 26, Sec. 1433) 69
SEC. 3477 (U. S. C., Title 31, Sec. 203) 70

Miscellaneous:

Sales Tax Ruling 563, XI–2, Cumulative Bulletins 522 ... 51
Treasury Regulations 43, promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928 and 1932:
ART. 5 71
ART. 29 74
ART. 54 ..... 38, 77
H. Rep. No. 960, 55th Cong., 2d Sess 42
Cong. Record, Vol. 31, Part 4, pp. 3865–3866 42
Cong. Record, Vol. 32, Part 1, pp. 492–493 42

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There are four opinions below. The first is the opinion of the District Court of the United States for the Northern District of Georgia on the decree dismissing the bill of complaint against the former collector, W. E. Page, which is reported in 10 F. Supp. 901; the second, the opinion of the Circuit Court of Appeals for the Fifth Circuit reversing such decree (R. 454–463), which is reported in 81 F. (2d) 577; the third, the opinion of the said District Court on the entry of a final decree on remand in favor of the respondent and against the

said Page, as such collector, which is reported in 18 F. Supp. 62; and the fourth, the opinion of the said Circuit Court of Appeals rendered December 18, 1937, affirming the last mentioned final decree of the said District Court after the substitution of the encumbent collector, Marion H. Allen, in place of the said Page, after his resignation and decease (R. 431–445), reported in 93 F. (2d) 887.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered December 18, 1937 (R. 446). The petition for certiorari was filed March 18, 1938, and was granted April 11, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent may maintain a suit to enjoin a Collector of Internal Revenue from recovering by distraint admissions taxes imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and collected under its authority from purchasers of tickets of admission to intercollegiate football games.

2. Whether Section 11 of the Act of February 13, 1925, permits the substitution of the Collector's

successor in office as defendant and the continuance of the suit against him.

3. Whether the respondent, or its agents, were engaged in the performance of an essential governmental function in staging intercollegiate football games, in which teams representing the University of Georgia and the Georgia School of Technology participated.

4. If question 3 is answered in the affirmative, then whether the Federal admissions tax referred to imposes an unconstitutional burden upon the State of Georgia.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra,* pp. 62–77.

STATEMENT

No returns were filed in respect of the tax imposed by Section 500 (a) (1) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932 (Appendix, *infra,* p. 65), on admissions to athletic events held at the University of Georgia and at the Georgia School of Technology during September and October 1934, the period here in question. Accordingly the then Collector of Internal Revenue for the District of Georgia, W. E. Page, prepared such returns in the amount of $895.37 for admissions tax collected by the University of Georgia Athletic Association on admis-

sions to such events held during that period at the University of Georgia and in the amount of $3,914.63 for admissions tax collected by the Georgia Tech Athletic Association on admissions to such events held at the Georgia School of Technology during that time. Neither sum was paid (R. 329). The Commissioner of Internal Revenue made assessments against each association in the amount thus returned for it and certified the assessments to the said collector (R. 349–350), who forthwith made demand upon each association for the payment of the amount returned for it, and upon its failure to pay filed a lien, issued a warrant, and caused levy thereof to be made upon the bank account in which the association had deposited and was holding the amount of the tax, so collected and withheld by it, as a special trust for the United States, as required by Section 607 of the Revenue Act of 1934 (Appendix, *infra,* p. 66); and, in addition, the said collector served notice of levy and demand for payment upon each of the banks in which these amounts had thus been deposited (R. 356–358).

Thereupon, the respondent, the Regents of the University System of Georgia (a public corporation entrusted by law with the control and management of these schools), filed its bill of complaint, with a later amendment thereto, against the said Page as such collector, in the District Court of the United States for the Northern District of Geor-

gia, praying for a judgment declaring that it was immune from the Federal admissions tax because it was an agency of the State and was performing an essential governmental function in staging the athletic events in question. It further sought an injunction *pendente lite* against said Page as such collector, and against his agents, etc., from proceeding with said collection, and a permanent injunction upon the declaration requested (R. 1–14, 18–24). The complaint was, on motion of Page, dismissed for want of equity. (See *Regents of the University System of Georgia* v. *Page,* 10 F. Supp. 901.)

On the Regents' appeal, the decree of dismissal was reversed by the Circuit Court of Appeals for the Fifth Circuit, Judge Hutcheson dissenting (R. 431–445; 81 F. (2d) 577). The decision proceeded upon the premise that the respondent, or its agents, did not voluntarily act as agents for the Federal Government in the collection of the tax; that it was therefore not estopped to assert that the exaction was an infringement of its constitutional exemption from the tax, and that, since it could not maintain an action to recover the tax if paid, because it was not the taxpayer but only the agent of the Government in collection, it was entitled to maintain the bill to restrain collection.

Upon the ensuing trial, the District Court found the facts to be in substance as follows (R. 153–154): The respondent is a public corporation and instru-

mentality of the State of Georgia, under whose supervision are its two branches, the University of Georgia and the Georgia School of Technology. At all the times here involved, and prior thereto, there was maintained at each of these schools an athletic association, incorporated under the laws of Georgia, known as the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, which had control, among other things, of intercollegiate contests in football, to which the public was admitted upon the payment of admission charges of varying amounts (R. 150–151). The expenses of physical education and athletic programs at each school were supported in large measure from admission charges to athletic contests; in addition, a small student's fee was collected from each student, which was also used for such purpose, the entire expenses of physical education and athletic programs in each school being met by such admission charges and student fees. During and since the year 1934, each ticket of admission to such athletic events at the University of Georgia contained the following notice (R. 152):

> The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its

> liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

The same appeared on all tickets of admission to athletic contests at the Georgia School of Technology, except that the name "School of Technology" was inserted in lieu of the name "University of Georgia"[1] (R. 152). Neither the Regents nor the athletic associations, nor any other branch or instrumentality of the respondent, had made any returns to the petitioner for the period in question of the amount stated on the admission tickets as a tax. Each association kept all amounts so collected separate and apart from all other funds and deposited them in a separate bank account, the amount so collected by the University of Georgia Athletic Association ($895.37) being deposited in the Citizens and Southern National Bank in Athens, Georgia, and that collected by the Georgia Tech Athletic Association ($3,914.63) being deposited in the First National Bank in Atlanta, Georgia. No part of these sums has ever

[1] This was printed on the back of each ticket (R. 152). On the face of each there was printed, in accordance with the requirements of Section 500 of the Revenue Act of 1926, as amended (see Appendix, *infra*, p. 62), the admission price, the amount of the Federal tax, and the total amount of the admission price and tax (R. 193–194); see also Plaintiff's Exhibit 4 (R. 289), and Defendant's Exhibits 6–A and 6–B (R. 344, 345).

been paid to the said Page as such collector or to the United States (R. 150–151); and, upon such failure to make the returns and pay the taxes on said admissions, the said Collector made such returns and assessments in said amounts against the said associations and proceeded to their collection by distraint (R. 153–154).

The District Court construed the decision of the Circuit Court of Appeals to hold that the bill of complaint stated a cause of action and that a decree should go for the respondent if the allegations of the bill were established, as he found them to be (R. 155–156). The court accordingly entered a final decree restraining Page, his agents, etc., from further proceeding under the levies and warrants aforesaid and cancelling them and the liens thereby created (R. 157–158).

The Collector appealed from this decree. During the pendency of the appeal, the defendant Page resigned and, before the argument, died. Over his objection (R. 449–451), the court ordered Marion H. Allen, the successor of the said Page, to be substituted as the appellant in the action (R. 448). The court then affirmed the decree, Judge Hutcheson dissenting (R. 446). The court reached the same conclusion on equity jurisdiction on the second appeal, but upon a different ground, namely, that the respondent had not collected the tax. Its decision on tax immunity is predicated (1) upon the view that the tax affects the State directly and hence casts a burden upon a State

nction, and (2) that the staging of intercollegiate otball games is an essential governmental func-on (R. 433). Judge Hutcheson dissented upon th propositions (R. 440).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that, despite Section 3224 of the evised Statutes, the respondent could maintain suit to enjoin a Collector of Internal Revenue om recovering by distraint admissions taxes im-sed by Section 500 of the Revenue Act of 1926, amended by Section 711 of the Revenue Act of 32, and collected by it or its agents or instru-entalities from purchasers of tickets of admission intercollegiate football games.

2. In holding that respondent had standing to ntest the validity of the tax.

3. In holding that Section 11 of the Act of Feb-ary 13, 1925 (U. S. C., Title 28, Sec. 780), au-orizes the substitution of the Collector's suc-ssor in office and the continuance of the suit ainst him.

4. In holding that the respondent or its agents instrumentalities were engaged in the perform-nce of an essential governmental function in stag-g intercollegiate football games in which teams presenting the University of Georgia and the eorgia School of Technology participated, and at hence that the purchasers of admission tickets ere immune from the tax and it and its agents and

instrumentalities not required to pay over to the Government the amounts it or they had collected from such purchasers as tax.

5. In holding that such tax imposed a direct burden upon the State of Georgia.

6. In reversing the original decree in the District Court of the United States for the Northern District of Georgia dismissing the respondent's bill of complaint for want of equity.

7. In entering its order substituting Marion H. Allen, the incumbent collector, in the place of W. E. Page, the former collector, against whom the suit was instituted, upon his resignation and death during the pendency of the action in the court below on the second appeal.

8. In affirming the decree of the District Court, entered on remand, enjoining the collection of the tax and cancelling the levies, warrants of distraint, and the liens thereby created.

9. In holding that the findings support the decree of the District Court, and that there is evidence to sustain it.

SUMMARY OF ARGUMENT

I

The respondent may not maintain a suit to enjoin a Collector from recovering by distraint admissions taxes collected by it.

(a) The Circuit Court of Appeals held that the taxes had not been collected, or so it now interprets

its earlier decision. Such conclusion, however, does not justify the decision, because neither the District Court nor the court below had jurisdiction to determine that question in an injunction suit. Here it is shown that the Commissioner determined that the tax had been collected. Such determination was not arbitrary but found substantial basis in the acts of the respondent pleaded in the bill. The Government is entitled to require the payment of the taxes as a condition precedent to a resort to the courts by the party against whom the tax is assessed. Congress has specifically withdrawn jurisdiction over any suit having for its purpose the restraint of collection. Section 3224 of the Revised Statutes has been construed to apply to any suit which interferes with or impedes the assessment or collection of the tax. If there is a statute imposing the asserted tax and a proper basis for the Commissioner's determination that the person assessed is liable, the courts have no authority to prevent collection. The bill must stand or fall upon the sufficiency of its averments of such exceptional and extraordinary circumstances as will demonstrate that the proposed action of the administrative officers has no proper basis and is arbitrary. None such is alleged.

(b) One who collects a tax as an agent of the Government may not enjoin the Collector from reducing the amount so collected to his possession. The tax is imposed upon the purchasers of tickets.

Furthermore, the amount collected is by the statute required to be held as "a special fund in trust for the United States." Hence, the lower court erred in holding that the respondent was, at best, merely a debtor of the United States. It is of no moment that the respondent is not in position to assert that the tax casts an unconstitutional burden upon an essential governmental function being performed by it. Respondent has a right to sue for recovery of any money illegally taken from it; but its rights extend no further. It often happens in cases of the imposition of taxes upon its officers or employees, or in respect of its contracts, that neither the United States nor the State is in position to assert any implied constitutional immunity.

(c) Furthermore, the respondent could not maintain the suit upon the basis that it had acquired the rights of the individuals who had paid admissions taxes. The purchasers of tickets were the taxpayers, not the respondent. It is clear that the endorsement on the tickets was designed to put the respondent in position to maintain the suit, and that, but for the agreement evidenced thereby, the court below would have denied it any relief. The purchasers of admissions, and they alone, had claims against the United States for the amount of the tax paid, if it was unlawfully collected; and, only if the endorsement on the tickets operated as an assignment of their claims, have they lost that right by relinquishment thereof to the respondent. If the endorsement was an assignment, it falls within the

purview of Section 3477 of the Revised Statutes which prohibits assignment of claims against the United States. Moreover, the purchasers could not assign rights to an injunction which they did not have. The only right they had was to sue for a refund.

(d) If the respondent, or the athletic associations, did not in fact collect the tax, then they have an adequate remedy at law for the recovery of the amounts assessed against them, in the event they paid the same. Sections 3220, 3226, and 3228 of the Revised Statutes give both an administrative remedy and one at law to any person against whom a tax has been erroneously, or illegally, or improperly assessed, or from whom one has been erroneously, or illegally, or improperly, or in any manner wrongfully collected.

The regulations promulgated under these sections provide with respect to admissions taxes that a claim for refund may be filed by the person or organization against whom the taxes were assessed or by whom they were, in the first instance, erroneously or illegally paid. It is therefore clear that, upon the payment of the amounts involved to the Collector, the respondent would have had the right under the statute and applicable regulation to file a claim for refund and upon its rejection to have instituted an action at law to recover. In such action it could have litigated the question whether it had collected the tax and have recovered its money

61606—38——3

if the question were decided in the negative. On the other hand, if it had collected the tax, its status as a collecting agent—willing or unwilling—would have prevented recovery.

From what has been said it is apparent that the courts below were without jurisdiction to grant injunctive relief.

However, if the Court considers that it has jurisdiction in this suit, to determine whether the amount in question was collected as a tax, then we submit the evidence shows beyond peradventure that it was so collected.

II

Section 11 of the Act of February 13, 1925, does not permit the substitution of the Collector's successor in office as defendant and the continuance of the injunction against him. Generally speaking, the purpose of the statute was to permit revival of an action which had abated as a result of the death of an officer and to inaugurate a policy of permitting the substitution of the office. But nothing in the legislative history of the Act warrants assertion that Congress intended to permit the conversion of a personal action against a Collector into an action to enjoin the office, and hence the sovereign, from the collection of taxes, or to do more than to permit such substitution in cases involving the performance of mere ministerial uties, in which the Government has no direct or

pecuniary interest. In such situations, it was obviously desirable that substitution should be permitted. It has been held that the section does not authorize the substitution of a successor Collector for his predecessor in an action for the refund of taxes; and this even though such actions are in effect suits against the United States. There is much less basis for inferring that the substitution has been authorized and immunity thereby waived in such a suit, particularly since Congress has established through Section 3224 of the Revised Statutes a firm rule against enjoining the assessment or the collection of a tax.

III

The respondent, or its agents, were not engaged in the performance of an essential governmental function in staging intercollegiate football games for profit. We are here dealing with commercialized activities and hence there is no difference in principle between this case and *Ohio* v. *Helvering,* 292 U. S. 360. There the State had entered the market place seeking customers and hence had taken on the character of a trader. Here it entered the market place for the same purpose and took on the character of a purveyor of entertainment. The activity in question is not one of those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

While the Government need not rely upon the fact that the games were not an integral part of the curriculum of either school, it is clear from the evidence that they were not. If the decision in *Ohio* v. *Helvering, supra,* could be avoided by placing college authorities in charge of a project, almost any business could be conducted in the name of education. The educational features can in no event extend further than the student body. Such as were involved are limited to the players and cannot be extended to the general public invited to attend the games upon the payment of admission fees. Accordingly, the public cannot be considered auxiliaries primarily designed and used to aid in the management and operation of a governmental function. It follows that the attendance of the general public does not partake of the nature of such function. The immunity is not established because the State has the power to engage in the business of conducting football games. The whole doctrine of immunity is implied from the need of preserving the separateness and independence of the States; and where the reason for its application does not exist, it will not be applied.

IV

The admissions tax does not impose an unconstitutional burden upon the State, even if the staging of these games is deemed to involve the performance of an essential governmental function. The test is not the nature of the activity, as the

court below concluded. It is most problematical that respondent's receipts from its admissions would be diminished by the imposition of this tax upon its patrons. But even if they were diminished, it is settled that a non-discriminatory tax upon private persons may not be declared invalid for this reason. If respondent should object that it cannot be compelled to collect the Federal tax, the short answer is that this is a contention which can be raised only if a penalty should be asserted for its failure to collect the tax. It would be most inequitable to permit respondent to collect a tax for the Federal Government and then resist its payment on the ground that it could not have been compelled to collect.

ARGUMENT

I

THE RESPONDENT MAY NOT MAINTAIN A SUIT TO ENJOIN A COLLECTOR OF INTERNAL REVENUE FROM RECOVERING BY DISTRAINT ADMISSIONS TAXES, IMPOSED BY SECTION 500 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 711 OF THE REVENUE ACT OF 1932, AND COLLECTED UNDER ITS AUTHORITY FROM PURCHASERS OF TICKETS OF ADMISSION TO INTERCOLLEGIATE FOOTBALL GAMES

The question whether the court below erred in holding that the respondent could maintain a suit to enjoin the collection of admissions tax involves a number of subsidiary questions, namely: (a) whether the bill of complaint states any facts to entitle the respondent to injunctive relief and hence

whether the decree of the District Court granting the motion to dismiss was correct and should not have been reversed; (b) whether one who collects a tax as an agent of the Government may enjoin the Collector of Internal Revenue from proceeding by distraint to reduce the amount so collected to his possession; (c) whether the respondent could maintain the suit upon the basis that it had acquired the rights of the individuals who paid admissions taxes; and (d) whether, if the respondent or the athletic associations did not in fact collect the tax, it or they had an adequate remedy at law for the recovery of the amounts assessed against them in the event that they had paid the same. An answer in the negative to any one of these questions is dispositive of this case. We take them up in the order named.

(a) THE BILL OF COMPLAINT STATES NO FACTS TO ENTITLE THE RESPONDENT TO INJUNCTIVE RELIEF AND HENCE THE DECREE OF THE DISTRICT COURT GRANTING THE MOTION TO DISMISS WAS CORRECT AND SHOULD NOT HAVE BEEN REVERSED

This being a suit in equity to enjoin the collection of taxes, it was rightly dismissed by the District Court (10 F. Supp. 901), and the court below erred in reversing the decree of dismissal. It appears from the bill of complaint that teams representing the University of Georgia and the Georgia School of Technology played football games during the months of September and October, 1934, to which admissions were charged; that each ticket of admission stated a part of the amount collected

as a tax; that 10% of the amount of all admissions so collected was set aside and deposited in separate bank accounts;[2] and that the Collector of Internal Revenue had levied warrants of distraint upon such bank accounts and demanded payment of the money to him in satisfaction of the assessments. It was further shown that each ticket of admission bore the following statement (R. 9):

> The University of Georgia [or School of Technology], being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

The bill alleged that the applicable Revenue Act imposed the admissions tax upon the individuals who purchased tickets, but that, properly construed, the statute was not applicable to individuals purchasing tickets of admission to the football games played at the University of Georgia and the Georgia School of Technology. It was further alleged that no taxes had been collected from the individuals purchasing tickets for admission to

[2] This was pursuant to Section 607 of the Revenue Act of 1934 (App. *infra*, p. 66).

such games and that the Collector sought to collect from respondent either (a) taxes which the statute, if applicable, had imposed upon the individuals who purchased tickets, or (b) criminal penalties imposed by the statute upon the respondent (R. 22–23).

The respondent was obliged to pay over to the Collector the taxes it had collected. Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932 (App., *infra*, p. 65) imposes "A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission * * *." Section 502 (a) of the Revenue Act of 1926 (App., *infra*, p. 63) imposes the duty of collecting the tax upon the person receiving payment for such admissions. Such person is thereby required to make monthly returns of the tax so collected and to pay it to the Collector. Section 607 of the Revenue Act of 1934 (App., *infra*, p. 66) requires that the amount of tax so collected shall be held in a special fund in trust for the United States, and that the liability imposed by Section 502 (a) upon the vendor of the tickets is to be enforced in the same manner and subject to the same provisions as are applicable with respect to the taxes from which such fund arose. Thus Section 3187 of the Revised Statutes (App.,

infra, p. 67), authorizing distraint, is made applicable.

Notwithstanding the allegation that no taxes had been collected by the respondent, the facts alleged in the bill disclose that whatever taxes were due had, in fact, been collected; that the amounts required by Section 500 (a) and the regulations promulgated thereunder to be stated on the admission tickets as taxes had been so stated (R. 9), and that the respondent, in order to protect itself, had reserved and set aside 10% of what it claims to be the amount so collected (R. 12). It clearly appears from the bill that the respondent took the necessary steps to relieve itself from penalties which the statute imposes for wilful failure to collect admissions taxes, and that such precautions are utterly inconsistent with its contention that the taxes had nevertheless not been collected. Under the circumstances, the allegation that no taxes had been collected is a mere conclusion of law which the District Court was free to and did disregard.

The Circuit Court of Appeals held that the taxes had not been collected—or so it now interprets its earlier decision. However, its conclusion that the tax was not collected, upon which it predicated its reversal of the District Court's dismissal of the bill, does not justify such reversal, because neither the District Court nor the court below had any jurisdiction to determine that question in an in-

junction suit. Here it was shown that a Federal statute imposed a tax upon admissions which the respondent was required to collect; that the Commissioner had determined that the tax had been collected; that such determination was not arbitrary, but found substantial basis in the acts of the respondent with respect thereto pleaded in the bill; that a fund or funds existed consisting of the exact percentage of admissions which the statute required to be collected; that the fund was on deposit to the respondent's credit; and that the Collector sought to reduce that fund to his possession. In such a situation there was no alternative to the granting of the motion to dismiss, and the court below was without power to determine the merits of the controversy as to whether the tax had in fact been collected by the respondent.

The Government is entitled to require the payment of the taxes as a condition precedent to a resort to the courts by the party against whom the tax is assessed (*Cheatham* v. *United States,* 92 U. S. 85, 88–89; *Phillips* v. *Commissioner,* 283 U. S. 589, 595, 597), and Congress has specifically withdrawn jurisdiction over any suit having for its purpose the restraint of collection of any taxes (Section 3224, Revised Statutes, Appendix, *infra,* p. 68). This statute has been construed to apply to any suit which would interfere with or impede the administration of the tax. *Gouge* v. *Hart,* 250 Fed. 802 (W. D. Va.), appeal dismissed, 251 U. S. 542; *Rals-*

ton v. *Heiner,* 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608; *Calkins* v. *Smietanka,* 240 Fed. 138 (N. D. Ill.); *Seaman* v. *Guaranty Trust Co. of New York,* 1 F. (2d) 391 (S. D. N. Y.).

We submit that the cases demonstrate that the administrative officers may not be interfered with when it is shown that they are acting under a statute which is or may be applicable to the persons whom the Commissioner holds to be liable therefor in any capacity. If there is a statute imposing the asserted tax, and if there is a proper basis for the Commissioner's determination that the person assessed is liable, the courts have no authority to prevent the collection. In *Snyder* v. *Marks,* 109 U. S. 189, 192–193, this Court interpreted Section 3224, Revised Statutes, as authorizing the Collector to collect "that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed."

We submit that a proceeding seeking to enjoin the collection of Federal taxes must stand or fall upon the sufficiency of the averments in the bill of complaint of the existence of such exceptional and extraordinary circumstances as will demonstrate that the proposed action of the administrative officers has no proper basis and is arbitrary. In addition it must appear that, without equitable relief, the complainant will suffer great, immediate, and irreparable injury to its property.

The challenged imposition is clearly a tax and those cases involving criminal penalties, such as *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, are without application. Equally inapplicable are stockholders' suits, such as *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, and *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. *Hill* v. *Wallace,* 259 U. S. 44, was a stockholder's suit, and this Court has also classed it with the penalty cases. *Graham* v. *du Pont,* 262 U. S. 234, 235, 237–238. Moreover, the basis for stockholders' suits has now been removed, since it is no longer necessary to protest the payment of tax in order to preserve the right to maintain suit. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373.

Miller v. *Nut Margarine Co.,* 284 U. S. 498, involved a situation where this Court said (p. 510): "A valid oleomargarine tax could by no legal possibility have been assessed against respondent * * *." In that case the plaintiff's product was not taxable under the Oleomargarine Act. This was clear from prior decisions of the administrative officers with respect to the very product involved. It was also clear from the decisions of the courts with respect to like products. It appeared that the Commissioner had changed his ruling and sought to collect taxes for the entire period during which the plaintiff had been in business without asserting similar taxes against competitors. The amount of the tax exceeded the selling price of the product and its collection would have been ruinous.

The Commissioner's determination was based upon regulations which assumed that the taxing statute was intended to be punctuated differently, and this Court held (p. 508) that "the Commissioner's rendition of the governing phrase was without warrant." The case at bar presents no analogy to the situation existing in the *Nut Margarine Co.* case. Here it did not appear upon the face of the bill that the taxes could by no legal possibility have been collected by the respondent. There is no denial that the language of the statute supports the assessments. At most it appeared that there was a controversy with respect to the construction and validity of the statute in its application to respondent. Controversies not essentially different occur frequently, but nothing is better settled than that the initial construction and application of taxing statutes are committed to the administrative officers and that the jurisdiction of the courts to correct any errors is postponed until after the taxes have been collected.

Neither the averment that the tax is unconstitutional (*Bailey* v. *George,* 259 U. S. 16), nor the anticipation of a multiplicity of suits (*Dodge* v. *Osborn,* 240 U. S. 118; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447; *City of Seattle* v. *Poe,* 4 F. (2d) 276 (W. D. Wash.)), nor injustice, hardship, irregularity, or inconvenience (*State Railroad Tax Cases,* 92 U. S. 575; *Reinecke* v. *Peacock,* 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S.

699), nor danger of loss of credit or inability to pay because of lack of funds (*Thornhill Wagon Co.* v. *Noel,* 17 F. (2d) 407 (E. D. Va.)), nor the allegation that the tax is confiscatory, or too high (*Broadway Blending Corporation* v. *Sugden,* 2 Fed. Supp. 837, 839 (W. D. N. Y.); see also *McCray* v. *United States,* 195 U. S. 27), may be made the basis for injunctive relief.

We submit that the bill on its face shows that the Collector's proposed action was not arbitrary, and that it discloses no facts whatever showing that the respondent was threatened with irreparable injury, and none that the case was within some recognized principle of equity jurisprudence. Under these circumstances, the dismissal of the bill should in the first instance have been affirmed.

(B) ONE WHO COLLECTS A TAX AS AN AGENT OF THE GOVERNMENT MAY NOT ENJOIN THE COLLECTOR OF INTERNAL REVENUE FROM PROCEEDING BY DISTRAINT TO REDUCE THE AMOUNT SO COLLECTED TO HIS POSSESSION

In limine, the bill of complaint alleges (R. 10) that a claim for refund was denied after the taxes had been paid for an earlier period, and the lower court refers to that fact in its decision reversing the dismissal of the bill (81 F. (2d), at p. 580).[8]

[8] In an opinion handed down by the court below on April 16, 1938, in the case of *Marion H. Allen, Collector* v. *George L. Shelton,* Judge Holmes, who wrote the opinion of the court on the prior appeal, in distinguishing the case at bar, stated that the special and extraordinary circumstances which in its judgment warranted equitable relief in the

But surely this does not justify the grant of an injunction. The denial of such claim was merely a preliminary step in securing a judicial determination of respondent's rights; its denial does not demonstrate that it has no remedy at law, and it could, therefore, not make its failure to submit the earlier controversy to the courts a justification for enjoining a later collection. However, the purpose of the allegation seems to have been to demonstrate that when it collected the tax, as it concededly did in the prior period, its claim for refund was properly denied, because it had no standing as a collecting agent to challenge the validity of the tax. Indeed, the court below so held (*loc. cit.*, p. 580), and to the authorities there cited should be added *Columbus & Greenv. Ry.* v. *Miller,* 283 U. S. 96, 100; *United States* v. *First Capital Nat. Bank,* 89 F. (2d) 116, 124 (C. C. A. 8th); *United States* v. *American Exchange Irving Trust Co.,* 43 F. (2d) 829 (S. D. N. Y.); also *Miami Valley Fruit Co.* v. *United States,* 45 F. (2d) 303 (C. C. A. 5th), certiorari denied, 283 U. S. 841, and *United States* v. *Erb,* 8 F. Supp. 947 (S. D. N. Y.).

Even taxpayers who have paid over but have not borne the burden of and have "passed on" a tax to others may be denied refunds by statute. *An-*

---

case at bar were "demonstrated by the fact that the Regents had actually paid the tax in former years, and filed a claim for refund which was denied on the ground that they had not borne the burden of any part thereof."

niston Mfg. Co. v. *Davis,* 301 U. S. 337, 348; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386. Apart from statute the tax cases have applied the doctrine of unjust enrichment and the view that an action for refund of a tax is an action for money had and received which is governed by the broadest equitable principles and considerations of abstract justice and which denies a refund to one not entitled in "equity and good conscience" to receive it. See *United States ex rel Girard Co.* v. *Helvering,* 301 U. S. 540, 542; *Stone* v. *White,* 301 U. S. 532, 534–536; *Bull* v. *United States,* 295 U. S. 247, 261–262; *Lewis* v. *Reynolds,* 284 U. S. 281, 283. In the absence of statute refund of a tax has been denied on the grounds that the plaintiff who has shifted the burden of the tax does not come into equity with clean hands. *Richardson Lubricating Co.* v. *Kinney,* 337 Ill. 122; *Standard Oil Co.* v. *Bollinger,* 337 Ill. 353.

The tax is not imposed on the respondent as vendor of tickets but on the purchasers. The statute imposes no tax liability on a vendor who fails to collect the tax,[4] although it does subject him to a penalty for willful failure to collect the tax in an amount equal to the tax and to other penalties. Revenue Act of 1926, Sections 500 (d) and 1114

[4] In this respect it differs from collections made at the source by persons paying compensation to non-resident aliens under Section 221 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 35. See *Houston Street Corp.* v. *Commissioner,* 84 F. (2d) 821 (C. C. A. 5th).

(b), (d), (e), and (f). (Appendix, *infra,* pp. 62, 64, 65.)[5]

Furthermore, the amount of the tax collected is by statute constituted and required to be held as "a special fund in trust for the United States." (Section 607 of the Revenue Act of 1934, App., *infra,* p. 66.) It is submitted that the fund was no less the property of the United States than if it had been deposited in its name or in the name of one of its fiscal officers or had been paid directly into the Treasury. Whatever effect the endorsement had was to put the respondent in the position to recoup from the United States the amounts the purchasers would have been entitled to recover had their claims for refund been sustained. It follows that the lower court was in error when in its previous opinion it indicated in reliance upon *United States* v. *Johnston,* 268 U. S. 220, 226, that

[5] If, as respondent asserts, there is no authority to impose this tax or to require the State to collect it, neither would there be any authority to impose a penalty for failure so to collect. Respondent's lack of confidence in its ability to establish its immunity and avoid the penalty is a wholly inadequate basis for the maintenance of this action.

What respondent insists upon is a right to raise a constitutional question whether or not the tax is imposed upon it. But there is no abstract right to raise a constitutional question. This Court has pointed out that constitutions are intended to preserve practical and substantial rights, not to maintain theories. *Davis* v. *Mills,* 194 U. S. 451. Respondent has a right to maintain a suit to recover any money erroneously taken from it and it is entitled to nothing further.

at best the respondent was merely a debtor of the United States. (*Loc. cit.*, p. 581.) In that case it was held that the provisions of the 1918 Revenue Act as to collections of admissions taxes made the vendor of admissions the debtor of the United States and not a bailee. But this Court clearly indicated that the situation was different under other acts, referring to *United States* v. *Thomas*, 15 Wall. 337.

It would therefore seem to be useless to pursue the matter further, if it were not for the circumstance that the assumed lack of a remedy was relied upon by the respondent and considered by the court below as a basis for injunctive relief. (See paragraph 23 of the bill of complaint, R. 10, and the opinion of the court below on the prior appeal.) (*Loc. cit.*, p. 580.) Furthermore, this was undoubtedly the circumstance which induced the lower court to hold that the agreement which the respondent imposed upon the purchasers of admissions was one of which the United States could not complain (*loc. cit.*, p. 580), and as a result of which it held the respondent had obtained title to the money which represented the amount of the tax collected (*loc. cit.*, p. 581).

While *United States* v. *First Capital Nat. Bank, supra,* involved a suit by the United States for the recovery of the tax from the depository of football admission taxes collected by the University of Iowa, the only factual difference between the two

cases lies in the fact that in the former the University did not state on the admission tickets that the amount collected as a tax would be considered a part of the admission charge if the Government's claim thereto were defeated. But, surely, an agent of the Government cannot put himself in position to maintain an injunction suit or otherwise resist the reduction to the Collector's possession of the amount collected by the agent as a tax by forcing a stipulation upon the purchaser that the amount so collected from him shall belong to the agent in the event he succeeds in defeating the Government's claim thereto.

In any event, it is of no moment that the respondent is not in position to assert that the tax casts an unconstitutional burden upon an essential governmental function being performed by it. As a mere agent, respondent has no interest which can be adverse to the United States. It often happens, in cases of the imposition of taxes upon its officers or employees, or in respect of its contracts, that neither the United States nor the State is in position to assert any implied constitutional immunity, although, unlike respondent, it may have a vital interest in the question. Take, for example, the position of the United States in the case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134 and *Alward* v. *Johnson*, 282 U. S. 509, and that of the State in *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, *Liggett & Myers Co.* v. *United States*, 299 U. S.

383, and in the later case of *Helvering* v. *Mountain Producers Corp.*, No. 600, decided March 7, 1938. Indeed, neither the Government nor the State could urge any immunity except through an attorney who by leave of court appeared as its friend. There is no reason why the respondent should be placed in a better position in respect of taxes paid by the general public on admissions charged to exhibitions which it stages.[6]

---

[6] We have throughout the argument assumed, although we realize the violence of the assumption, that the separate entities of the respondent and the athletic associations may be disregarded and that the respondent is the real party in interest here. However, as already stated, the athletic associations were separate entities. They, and not the respondent, staged the games, collected the admissions and the tax. The amount of the tax was deposited in the accounts in their names or in the names of their officers. (R. 216–217.) The assessments were made against them and the levies of distraint upon the accounts mentioned. Furthermore, they kept their own books of account and had their own bank accounts from which they paid their own expenses by checks written by their own officers. (R. 191–195, 207; Defendant's Exhibits 25, 26, 27, R. 381–386; Defendant's Exhibits 4, 5–A, 5–B, 5–C, 27, 28, 29, R. 342–343, 384–387.) They hired their own employees, including football coaches, and paid their employees with their own funds. (R. 177, 197, 207.) No educational department of the school was similarly situated. (R. 225–226, 235.) As evidencing the independence of these corporations, see the contract forming the basis of the litigation in *State* v. *Regents of the University System*, 179 Ga. 210, 175 S. E. 567, under which the athletic corporations were to pay rent for the use of the athletic pavilions belonging to the schools. In short, the respondent did not, in its corporate capacity, conduct the athletic activities in question and did not collect

The reasoning of the court below is inconsistent. It concedes that, if respondent collected the tax as agent of the United States, respondent would have no standing to question the validity of the tax. The reason it would have no standing, as stated by the court (*loc. cit.*, p. 580), is that in such a situation respondent would have no interest in the subject matter of the controversy. Nevertheless, a lack of interest in the subject matter which would prevent it from questioning the validity of the statute in a suit at law is regarded by the court as an exceptional and extraordinary circumstance which entitles the respondent to maintain an injunction suit—and this despite an express statutory prohibition. We submit that such reasoning contains its own refutation.

(C) THE RESPONDENT COULD NOT MAINTAIN THE SUIT UPON THE BASIS THAT IT HAD ACQUIRED THE RIGHTS OF THE INDIVIDUALS WHO PAID ADMISSIONS TAXES

There can be no question that the purchasers of the tickets were the taxpayers, not the respondent. Indeed, the court below so considered, for in its opinion on the prior appeal it specifically said (*loc. cit.*, p. 581) that the respondent was not the taxpayer, but, at best, merely an alleged debtor to the

---

the tax. Nor were the assessments made against it, but against the associations. (R. 153, 349–350.) The result is that it is obviously not the real party in interest here, and for this additional reason is not in position to maintain this suit.

United States for *moneys had and received*. Furthermore, as has already been pointed out, the decision below proceeded upon the premise (*loc. cit.*, pp. 580–581) that the endorsement on the tickets was an agreement between the purchasers of admissions and the respondent by which title was vested in the respondent to that part of the moneys collected which represented the tax. And, in its opinion on the second appeal, the court thus explained its prior decision (R. 432):

> This court in its former decision held that the money was not collected as a tax, but under a peculiar contract with the ticket buyers whereby the complainants [the respondent] were entitled to assert ownership of it *if they could prove that no tax is collectible.* It was also held that under the peculiar circumstances, *including that just mentioned,* injunction was an available remedy. [Italics supplied.]

It would therefore seem clear that, in the opinion of the court below, the endorsement was made in order to put the respondent in position to maintain the suit, and that, but for the agreement evidenced thereby, the court below would have denied it relief. Compare *United States* v. *First Capital Nat. Bank, supra.* Therefore, the purchasers of the admissions, and they alone, had claims against the United States for the amount of the tax paid, if it was unlawfully collected; and only if the endorsement on the tickets operated as an assign-

ment of their claims have they lost that right by relinquishment thereof to the respondent. See *H. M. O. Lumber Co.* v. *United States* (W. D. Mich.), decided November 12, 1929, not officially reported, but see 1929 C. C. H., Vol. III, paragraph 9438, wherein the decision of this Court in *Spofford* v. *Kirk,* 97 U. S. 484, 490, is relied upon.

If the endorsement on the tickets was an assignment of these claims, we submit that, as such, it falls within the purview of Section 3477 of the Revised Statutes (Appendix, *infra,* p. 67). In speaking of the character of assignments embraced thereby, this Court in the *Spofford* case said (pp. 488–489):

> It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes power of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.

On the theory of the court below, the claims of the individual taxpayers are here sought to be enforced against the United States by the assignee and for his sole use and benefit. Thus the United States is "in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability," against which the

statute was designed. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594–595, 596–597.

The statute has repeatedly been applied to assignments of claims for refund of taxes. See, e. g., *Dalton Foundries* v. *United States*, 56 F. (2d) 483, 487 (C. Cls.); *H. M. O. Lumber Co.* v. *United States, supra; Choctaw Cotton Oil Co.* v. *United States*, decided October 9, 1931 (E. D. Okla.), not officially reported, but see 1931 C. C. H., Vol. III, paragraph 9631; *Cowpens Manufacturing Co.* v. *United States*, decided May 11, 1932 (W. D. S. C.), not officially reported, but see 1932 C. C. H., Vol. III, paragraph 9406. Compare *Daube* v. *United States*, 59 F. (2d) 842 (C. Cls.); *Fidelity Title & Trust Co.* v. *Heiner*, 34 F. (2d) 350 W. D. Pa.) and *Carleton Dry Goods Co.* v. *United States*, decided March 15, 1928 (E. D. Mo.), not officially reported, but published as Treasury Decision 4209, VII–2 Cumulative Bulletins 172, and in 1928 C. C. H., Vol. III, paragraph 7905.

And finally, in this connection, we submit that it is of no moment that the suit is not specifically brought for the recovery of a sum of money, but one to prevent the proper officer of the United States from reducing the trust fund to his possession. The prohibition of the statute does not concern itself with the manner in which the right under an assigned claim is asserted, but only with its assignment.

In order to create any rights which they could transfer, the individual purchasers of tickets must

ıave paid the tax. Therefore, they could not have ıssigned the right to enjoin collection from them. If the individual purchasers of the tickets paid the ax, they would have a remedy at law to recover it. Hence, if they assigned anything, it must have been a remedy at law. Assuming with the court below hat the assignment was valid, the respondent, in ts turn, acquired a remedy at law; and yet the ourt below based its decision upon the absence of uch a remedy.

D) IF THE RESPONDENT OR THE ATHLETIC ASSOCIATIONS DID NOT IN FACT COLLECT THE TAX, THEN IT OR THEY HAD AN ADEQUATE REMEDY AT LAW FOR THE RECOVERY OF THE AMOUNTS ASSESSED AGAINST THEM IN THE EVENT THEY HAD PAID THE SAME

The bill of complaint alleges that the tax was in fact sought to be collected from the two schools as "branches of the State of Georgia"; that the sums demanded and sought to be distrained represented certain admissions; that the fund levied upon was the exclusive property of the respondent, and that it, and the athletic associations under its instructions, had refused to collect and had not collected any tax on such admissions for the Government. (See paragraphs 13, 14, and 19 of the bill, R. 5, 8.) Thus the theory of the respondent's bill is that under the facts alleged, and particularly because of the reservation in the endorsement, the associations did not collect the tax.

If so, Sections 3220, 3226, and 3228 of the Revised Statutes, as amended (App., *infra*, pp. 67, 68,

69), give both an administrative remedy and one at law to any person against whom a tax has been erroneously, or illegally, or improperly assessed, or from whom one has been erroneously, or illegally, or improperly, or in any manner wrongfully collected.

In so far as the recovery of admissions taxes so assessed or collected under sanction of the statute are concerned, Section 3220 provides that refunds shall be made "subject to regulations prescribed by the Secretary of the Treasury." Pursuant to such authority, the Commissioner, with the approval of the Secretary, on June 14, 1932, promulgated Article 4 of Treasury Regulations 43, already referred to (Appendix, *infra,* p. 67). This Article provides, among other things, that:

> A claim for the abatement or for the refund of any taxes alleged to have been erroneously and illegally assessed or paid * * * must be filed by the person or organization against whom the taxes were assessed, or by whom such taxes were in the first instance erroneously or illegally paid. * * *

Therefore, since the assessments were made by the Commissioner against the athletic associations pursuant to the supposed authority of Section 607 of the Revenue Act of 1934 (App., *infra,* p. 66), and since the question available to respondent in an appropriate proceeding is whether the associations collected the amount representing the tax, as such, or as a part of the admissions fee, and since that question was determined by the Commissioner

gainst the associations, it follows that the right of
ie associations (or the respondent) to refunds
epended on whether the Commissioner was in
rror in his determination that, under the facts
f the case, the associations had in fact collected
ie tax.

Thus it is clear that, upon payment of the
mounts involved to the Collector, the athletic as-
ociations (if not the respondent) would have had
ie right under the statutes and the applicable reg-
lations to file claims for refund, and upon their
ejection to have instituted actions at law to re-
over. And in such actions they could have liti-
ated the question whether, under the facts of the
ase, they had collected the tax or not. In such a
uit a determination that they had not collected
ie tax would result in a judgment in their favor
nless the Court determined a liability under Sec.
114 (d) for a penalty. In that event the oppor-
unity would be afforded to raise the constitu-
onal question. On the other hand, if they had
ollected it, their status as collecting agents—will-
ig or unwilling—would have prevented them from
aising the constitutional question, with the result
iat judgments would have had to be entered
gainst them. It follows that the associations (if
ot the respondent) had an adequate remedy at
w.

For the reasons set out in the several subdivi-
ons in this point, it is respectfully submitted that

the bill of complaint states no grounds whatsoever for injunctive relief. The court had no jurisdiction to grant any relief and the bill should therefore have been dismissed.

However, if the Court considers that it has jurisdiction in this suit to determine whether the amount in question was collected as a tax, then we submit the evidence shows beyond peradventure that it was so collected. It discloses that the tickets separately stated the amount of the admission price, the amount of the tax, and the total of the two, and that the amount collected as tax was held and deposited in a separate fund or funds. Thus it is clear that the conclusion of the court below "that the money was not collected as a tax" is grounded solely on the agreement evidenced by the endorsement on the tickets, whereby, in its opinion "the complainants [the respondent] were entitled to assert ownership if they could prove that the tax was not collectible" (R. 432). We submit that both the conclusion and the basis upon which it rests are erroneous and that there is no evidence whatsoever to justify injunctive relief.

II

SECTION 11 OF THE ACT OF FEBRUARY 13, 1925, DOES NOT PERMIT THE SUBSTITUTION OF THE COLLECTOR'S SUCCESSOR IN OFFICE AS DEFENDANT AND THE CONTINUANCE OF THE SUIT AGAINST HIM

Whatever authority exists for the substitution of the present Collector in the place of the deceased

Collector as defendant-appellant in this action must be found in Section 11 of the Act of February 13, 1925 (App., *infra,* p. 70), which, in so far as material here, provides that:

> * * * where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, * * *.

The precise question here presented, whether the substitution of the successor Collector may be made in a suit to enjoin his predecessor, since deceased, was reserved by the decision of this Court in *Ex Parte La Prade,* 289 U. S. 444, 459, although it is the Government's position that the rationale of that case is that the action, being purely personal to the deceased Collector, does not survive. The reservation thus made requires an examination of the question.

The Government concedes that, generally speaking, the purpose of the statute is to permit the revival of an action which has abated as a result of the death of an officer, where it appears that the cause of action survives. In such cases, the Con-

gressional purpose was to inaugurate a policy of permitting the substitution of the *office*. See *Fix* v. *Phila. Barge Co.*, 290 U. S. 530, 533, citing *Tyler* v. *Hand*, 7 How. 573; the opinion of Judge Learned Hand in *Bowers* v. *American Surety Co.*, 30 F. (2d) 244 (C. C. A. 2d); the report on the original measure (the Act of February 8, 1899, c. 121, 30 Stat. 822), namely H. Rep. No. 960, 55th Congress, Second Session, and the discussion of the question had on the floor of the Senate, on April 14, 1898, Congressional Record, Vol. 31, Part 4, pp. 3865–3866.[7] But there is nothing whatsoever in the legislative history of the enactment of this provision which warrants the assertion that Congress expressly intended to permit the conversion of a personal action against a Collector of Internal Revenue into an action to enjoin the office, and hence the sovereign, from the collection of taxes, by a continuous process of substituting his successor in office.

Thus the narrow question presented is whether such intention may be imputed to Congress as a result of the enactment of the Act of February 8, 1899, c. 121, 50 Stat. 822, which (with changes not here material) became Section 11 of the Act of February 13, 1925, *supra*. We think the answer to this question must be in the negative.

[7] In addition, there was a discussion on the floor of the Senate on January 9, 1899, reported in the Congressional Record, Vol. 32, Part 1, pp. 492–493.

As has repeatedly been pointed out by this Court (*Caledonian Coal Co.* v. *Baker,* 196 U. S. 432; *Irwin* v. *Wright,* 258 U. S. 219–222; *Ex Parte La Prade, supra; Fix* v. *Phila. Barge Co., supra*), the substitution act was passed by Congress as a result of the suggestion made by the Court in the case of *U. S. ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 603–604, that such legislation was desirable in view of the inconvenience arising in that and similar cases as a result of the well established rule that actions against public officers abated upon their death.

It is to be noted that the *Bernardin* case was a mandamus proceeding against the Commissioner of Patents to compel him to perform a purely ministerial duty, enjoined upon him by law, and that no pecuniary or property interest of the Government was involved. All of the cases cited by the Court involved proceedings or suits to compel the performance of ministerial duties, in which the United States had no direct interest. Indeed, the Court specifically pointed out that in the actions in question (p. 604):

> * * * the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie.

In its first action upon this suggestion, the idea of Congress appears to have been to include in the substitution, aside from mandamus proceedings,

only suits for injunctions instituted *by* officers of the United States. (See H. Rep. 960, *supra*.) However, suits *against* officers were ultimately included within the scope of the statute. While it does not appear just why Congress broadened the scope of the statute, it may be assumed that it was due to the well recognized fact that suits to prevent officers from acting in excess of their official duties were somewhat correlative to proceedings to compel the performance of ministerial duties. See *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Virginia Coupon Cases*, 114 U. S. 311, 315; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172.

But it is apparent that the substitution of the office in mandamus proceedings to compel the performance of a ministerial duty, or in correlative suits for injunction brought against officers where the rights of the sovereign are not brought in question, does not serve to convert them into actions against the sovereign. Such, for example, are the proceedings in mandamus to compel the issuance of a patent (*U. S. ex rel. Bernardin* v. *Butterworth, supra*), or to compel a territorial judge to take jurisdiction of an action attempted to be brought in a territorial court (*Caledonian Coal Co.* v. *Baker, supra*), or suits to enjoin the enforcement of excessive or discriminatory rates (*Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43; *Okla. Gas Co.* v. *Russell*, 261 U. S. 290), or to enjoin an

officer from proclaiming that the complainant corporation was not authorized to do business in the State (*Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146), or to enjoin the institution of a criminal proceeding (*Philadelphia Co.* v. *Stimson*, 223 U. S. 605), or to enjoin the annulment of an official action of a predecessor in office (*Noble* v. *Union River Logging Railroad, supra*), or to enjoin an officer from wrongfully barring the complainant from the use of the mails (*School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94).

In such situations it was obviously desirable that a substitution be permitted in order that the particular office might be given the same status as that of a corporation or a continuing body, such as a commission or board. See *U. S. ex rel. Bernardin* v. *Butterworth, supra,* and *Thompson* v. *United States*, 103 U. S. 480 (cited in the *Bernardin* case), in which the distinction between an officer and a continuing body was pointed out.

But the result of the substitution in the instant case would achieve a different result. Here the interests of the United States are directly involved. Indeed, one of its most essential, if not the most essential, Governmental function, namely, the taxing power, is in question. If continuous substitution is permitted in a suit to enjoin a Collector from collecting the tax or reducing a tax collected by an agent to his possession, then there can be little question that the character of the

suit is changed from one purely personal again
the Collector to one against the sovereign. Th
distinction between the two classes of cases has r
peatedly been pointed out by this Court. An e
position of the subject may be found in *Pennoy*
v. *McConnaughy*, 140 U. S. 1, 10.

III

INTERCOLLEGIATE FOOTBALL GAMES ARE NOT AN ESSEN TIAL GOVERNMENTAL FUNCTION

If any one of the contentions made by the Go
ernment under its first two points is sustained, th
validity of the tax is immaterial in this case. Bu
if this Court should rule against us on both point
it is necessary to consider whether an admissio
tax may be imposed with respect to the sale of foo
ball tickets by an athletic association of a sta
university.

There is no question of statutory constructio
involved. Section 500 (a) (1) of the Revenue A
of 1926, as amended, imposes a tax of 1 cent fo
each 10 cents, or a fraction thereof, of the a
mission price. Section 500 (b) (1) (A) exempt
admissions the proceeds of which inure to th
benefit of educational institutions. Section 5
(e), as added by Section 711 (c) of the Revenu
Act of 1932 provides that this exemption sha
not be allowed in the case of admissions to ath
letic games. Accordingly, the sole question
whether this specific enactment of Congress

invalid because of the implications of the Constitution.

1. We should have thought that there could have been no serious argument that the respondent, or its agents, were engaged in the performance of an essential governmental function in staging intercollegiate football games. It seems clear, as Judge Hutcheson pointed out in his dissent on the last appeal (R. 442), that we are here dealing with "gigantic, commmercialized activities." Hence there is no difference in principle between this case and the case of *Ohio* v. *Helvering,* 292 U. S. 360, 369, where it was held that the State of Ohio was not performing an essential governmental function in conducting retail liquor stores. There, as the Court pointed out, when the State entered the market place seeking customers, it took on the character of a trader. Here it took on the character of a purveyor of entertainment.

The concept of government had changed profoundly from the days of the Roman circuses to the more austere environment in which the Federal Constitution was framed. We hazard the statement that the members of the constitutional convention would doubt that twenty-two men playing a game with a ball constitute an essential governmental function. And we do not conceive that the sovereign functions of the State of Georgia are in any sense dependent on the success of the respondent's football teams. Whatever the popular interest in foot-

ball, it hardly can be supposed that such an activity is one of "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution." *Helvering* v. *Therrell,* No. 128, decided February 28, 1938, p. 4.

2. This would seem to be the case however closely integrated these games were with the educational curriculum of either school. Even if football were a required subject for all able-bodied male students, for which scholastic credit were given, we should not hesitate to say that the staging of intercollegiate football games for profit was not an essential governmental function, and this even though only students partook and received educational credits for making goals or winning games.

Nevertheless, the evidence in this case makes it clear that intercollegiate football games as conducted at these schools are wholly extra curricular, if not purely commercial, activities and that, during the period in question, both the University of Georgia and the Georgia School of Technology, through their respective athletic associations, maintained football teams and staged highly profitable spectacles along lines which have little or nothing to do with the educational functions of respondent.

Thus the evidence discloses the following: At the University of Georgia there were from 135 to 160 students on the football squad (R. 173), and 50

at the Georgia School of Technology[8] (R. 202). At each school there were employed a number of coaches (R. 177–179, 207). Those at the University of Georgia were members of the faculty, both in their capacity as football coaches and as instructors in the Department of Physical Education. In their capacity as coaches, they coached the football teams (R. 177), and in their capacity as instructors in the Physical Educational Department, they taught methods, practice, rules, and theory of coaching sports for high school coaching and for men planning to go into teaching and coaching positions (R. 163–164). But their salaries were paid out of funds of the athletic associations (R. 177). There was only one salary of $1,200 paid from state appropriations in the Department of Physical Education (R. 175).

Participation in football is entirely voluntary on the part of the students (R. 174); it is not a prerequisite to graduation,[9] and no credit is given therefor toward a degree (R. 164, 171, 172, 202, 227). At the University of Georgia, only between 5 to 10 per cent of the members of the football squad were students in the Department of Physical Edu-

[8] Thirty per cent of the students at the University of Georgia engage in intercollegiate athletics of one form or another (R. 162).

[9] This is subject to the somewhat paradoxical qualification that football could be substituted for military training, which is required of all able-bodied students, if the football player were physically unfit for military training (R. 171–173).

cation (R. 174), which had only from 42 to 45 students (R. 163).[10]

The Georgia School of Technology had no such department (R. 203). The schools scout for prospective football material (R. 184, 210–211). No such effort is made to coach or train students specially qualified along educational lines (R. 211–212), and there is no other department which seeks to recruit likely students and persuade or induce them to enter either of the schools (R. 214). About 30 players on the University of Georgia football squad have been given scholarships, derived from its athletic association (R. 182–183), and between 20 and 30 at the Georgia School of Technology (R. 242). The University of Georgia Athletic Association in 1934 donated funds ($8,057.45) to the General Scholarship funds of the University; these funds were given to athletes, who received the entire amount (R. 182–183). About the only restriction upon members of the football team seems to have been that they could not play unless they made certain grades (R. 165).

The athletic association of each school has built a large stadium, that of the University of Georgia having a seating capacity of about 30,000 and that of the School of Technology having a capacity of

[10] This is supported entirely by receipts from athletic contests. No appropriation is made by the State Legislature to go to the Department of Physical Education (R. 175, 218–219, 233).

about 29,000 (R. 187, 205),[11] which is primarily used for athletics (R. 218).[12] Students of the University of Georgia paid an annual athletic fee of $10, and those of the Georgia School of Technology $7.50, which included the right to free admission to all athletic events at their school (R. 176–177, 204). Hence all admissions collected and the tax thereon were paid by the general public, none by the students.[13]

The total receipts of the University of Georgia Athletic Association from all sources for the year ended August 31, 1935, were $91,620.25, of which $71,323.27 was derived from football admissions (R. 268–269), and the total receipts of the Georgia Tech Athletic Association for the six months ended December 31, 1934, from all sources were $119,-436.75, of which $74,168.51 was derived from the sale of tickets (R. 308). The total receipts from

[11] It is to be observed that the enrollment at the University of Georgia was only about 2,400, and at the Georgia School of Technology only about 2,000 (R. 179, 202).

[12] The Stadium at the University of Georgia was built from surplus funds in the hands of the athletic association. The money was borrowed and is being repaid from proceeds of funds of the association (R. 187). The stadium at the Georgia School of Technology cost $275,000 (R. 205). Its building was financed by a gift of $50,000 of Mr. John W. Grant, and returns from the funds received from gate receipts, including fees.

[13] This is borne out by the fact that the only moneys deposited in the special accounts as tax collected were received from the sale of tickets to the public (R. 194–196, 216–217). The Treasury has ruled that student athletic tickets are not taxable. Sales Tax Ruling (S. T.) 563, XI–2 Cumulative Bulletins 522 (1932).

football for the entire year 1934 were in excess of $127,000 (R. 214).[14]

3. At best, the majority of the court below considered the question "most doubtful" whether athletic games and exhibitions for which admission is charged could be considered so much a part of the governmental function of education of a state university as to be free from federal taxation (R. 435). But it resolved that doubt in favor of the function and immunity. In so doing, it is to be noted, the majority resolved its doubt against the validity of the federal statute, which expressly subjected to taxation the admissions to university athletic games or exhibitions without regard to whether it is a state institution.

It requires no more than a statement of the reasons assigned by the majority of the court to demonstrate that they do not justify the somewhat startling conclusion which was reached. These are: (a) that physical education is an integral part of higher education as conducted by the Regents; (b) that the football coaches employed by the athletic associations were members of the faculty; (c) that the contests, as well as the contestants, were subject to regulation by faculty rules; (d) that the money derived from admissions belonged to the state; (e) that athletics are a formal feature of education; (f) that public athletic contests are not

[14] The Georgia Tech Athletic Association derived $50,000 from the Rose Bowl game in California in 1929 (R. 206), and the total receipts from football in that year were about $200,000 (R. 215).

an abuse of physical education; (g) that contests between colleges are a superlative degree of public exhibition, and (h) that the charging of admission dues is similar to a license fee; that it is in effect a tax, and that to prohibit or to tax this is an interference with a legitimate governmental function. On the other hand, the court said that if the Regents had hired athletes the admissions would be taxable.

If the decision in *Ohio* v. *Helvering, supra,* could be avoided by placing state college authorities in charge of a project, an easy way would be open to nullify the decision of this Court. Almost any business could be conducted in the name of education. Thus, an engineering course might be expanded to include the operation of a street railway system and furnish a basis for the claim that the result in *Helvering* v. *Powers,* 293 U. S. 214, had been avoided. The connection of the college authorities with the staging of football games can be justified only because the State regards such contests as an appropriate part of a program of physical education. Without challenging the propriety or the wisdom of such a course, and conceding that the State may decide such questions for itself, we submit that the educational features can extend no further than the student body and that the State with equal propriety could have placed the promotional features of such contests under the direction of others than the college authorities. The fact that the State has selected the college au-

thorities to handle the entire spectacle—including both the educational and the promotional features—does not require that the project in its entirety be considered as educational. The business of furnishing entertainment to the public retains its commercial character and a Federal tax upon the admissions paid by the general public presents no different question than if the promotional features of the project had been entrusted to State officers especially employed for the purpose.

Whatever elements of education may be thought to be involved in intercollegiate football seem to us to be limited to the players. But even if the educational features were acknowledged to extend to the entire student body the general public would still be left to be accounted for. The education or edification of a student body of 2,400 or 2,000 does not require a stadium seating 35,000 or 29,000 persons. The State, in conducting its football games, was plainly not seeking to contribute to the education of non-students and they, equally clearly, were not in attendance for educational purposes. "Education" is a term of broad connotations, but certainly the education which is protected from taxation by the implications of the Constitution relates more to textbooks than to score-cards, and more to intellectual instruction than to responsive shouting for a cheer leader. Thus, we do not see that it can seriously be argued that the general public

which attends a football game is in any way the subject of a State's educational program. And, it is to be noted, the taxable admissions are charged only to the non-student body which attends the games (*supra,* p. 51).

4. Since the tax relates only to the attendance of the public, it seems that it cannot under any view be considered as directed at "auxiliaries primarily designed and used to aid in the management and operation of a governmental function" within the rule announced in *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 406. For, even if it were assumed that intercollegiate football games are a part of the governmental function of education, the attendance of the general public is wholly irrelevant to the supposed educational nature of those games. Even if the exercise obtained by the players and the excitement of the student spectators be thought an integral part of their higher education, these may be received independently of the attendance of the general public.

The only function of the non-student spectator which can be said to relate to higher education is the fact that his admission fee provides the funds to support the athletic programs of the schools. From this it might be argued that the admissions share in defraying expenses of athletic programs of the schools. But any such contention would be baseless under the recent decisions in *Bankline Oil Co.* v. *Helvering,* No. 388, and *Helvering* v.

Mountain Producers Corp., No. 600, decided March 7, 1938.

5. This Court has many times announced the guiding principles which must apply when an immunity from Federal taxation is claimed. The reason for the rule "is found in the necessary protection of the independence of the national and state governments." *Helvering* v. *Powers*, 293 U. S. 214, 225.[15] Since this is the reason for the doctrine of inter-governmental tax immunity, it also marks the limits of the exemption. "Springing from that necessity, it does not extend beyond it." *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

It is difficult to find any activity of government which is farther removed from sovereignty than the conduct of the commercial spectacles which constitute an intercollegiate football schedule. In the case of the Boston Elevated Railway (*Helvering* v. *Powers, supra*) or in the case of the state liquor monopoly (*Ohio* v. *Helvering, supra*) the activities in question not only produced revenue but also served to foster the health, comfort, or

[15] The principle has similarly been formulated in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523; *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 391; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

morals of the community. So far as we are aware, attendance at a football game subserves none of these objectives. The majority of the court below has stretched the principle of tax immunity beyond its outposts.

IV

THE ADMISSIONS TAX DOES NOT PLACE AN UNCONSTITUTIONAL BURDEN UPON THE STATE, EVEN IF IMPOSED WITH RESPECT TO AN ESSENTIAL GOVERNMENTAL FUNCTION.

Wholly apart from the fact that the staging of football games can not be said to be an essential governmental function of the State of Georgia, it seems impossible to say that the imposition of a nondiscriminatory admissions tax upon the private persons who watch these games threatens the sovereignty or independence of the State.

The federal admissions tax is imposed on the person who purchases the admission ticket, and not on the vendor. Section 500 (A) (1) of the Revenue Act of 1926 as amended. It is, therefore, perfectly plain that respondent is completely unaffected by the tax except so far as (1) its receipts from admissions might be thought to be diminished by the imposition of the tax, or (2) it is burdened by the necessity of making tax returns to the Collector. Neither argument can serve to grant the respondent an immunity from a non-discriminatory tax.

1. Any contention that respondent's receipts from its football games would be diminished because of a federal tax imposed and collected on its patrons cannot serve to invalidate the tax. It is highly conjectural to assume that attendance at football games would be diminished by the necessity of paying the admissions tax. The spectator who attends a football game is not a businessman, comparing costs and prices in a commercial transaction, but a person who seeks pleasure on his holiday. Only the most speculative considerations would indicate the possibility of any appreciable diminution in attendance if a tax were imposed in addition to the ordinary charge for admission.

But even if the federal tax were certain to result in diminished revenues to the athletic associations, this would afford no basis for declaring their patrons immune. This Court has twice, in the present Term, expressly held that the lowered revenues or increased costs to the sovereign which may result from a non-discriminatory tax on private persons afford no basis for extending to them the sovereign's immunity from taxation. *Helvering* v. *Mountain Producers Corps.*, No. 600, this Term; *James* v. *Dravo Contracting Co., supra*, p. 160. And, in a variety of situations, the earlier decisions of this Court have sanctioned taxes which, much more necessarily than is the case here, had the effect of reducing the revenues or increasing the costs of the sovereign. *Wheeler Lumber Co.* v.

United States, supra; Alward v. *Johnson, supra; Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Tirrell* v. *Johnston,* 293 U. S. 533; *Liggett & Myers Co.* v. *United States, supra.*

2. The only other ground on which the State can be argued to be affected by a tax on those buying football tickets is the fact that the athletic associations are required to make returns of and pay over to the Collector the amounts of the federal tax which they receive from their patrons. Section 502 (a), *infra,* requires the person receiving payments for admissions to make monthly returns under oath and pay the taxes collected by him to the Collector of Internal Revenue. The general provisions of the Act of 1926 require, in Section 1102 (a), *infra,* that persons liable for the collection of the tax shall keep records and comply with the regulations of the Commissioner, and further subject, in Section 1114 (d), *infra,* the person collecting the tax to a penalty for the amount of the tax in the case of a willful failure to collect or to pay over the tax to the collector.

This case presents no occasion for considering whether or not the requirement that the athletic associations collect and account for the federal tax infringes any sovereign immunity of the State.[16] If

[16] It may be observed, however, that the practical burden of making returns and paying over the taxes collected seems plainly to be so trifling as to afford no basis for any contention that the independence of the State's sovereignty is threatened. And a claim of tax immunity "cannot be sup-

the respondent has collected the tax, we do not see any basis upon which it could be permitted to retain the money. If the respondent has taken from the purchasers of tickets sums of money, which would not have been taken except for the tax statute, it would be wholly inequitable for a court of equity to permit respondent to retain the money upon the ground that respondent could not have been required to collect it in the first instance. Such a result would be unjustly to enrich the respondent.

Accordingly, we think that, in this proceeding at least, it is entirely inappropriate to deal with the question whether respondent could be required by the Federal Government to collect the tax. If it be decided that the Federal Government may validly impose the tax and may validly request the States to cooperate with the Federal Government and aid in the collection, we do not think that any State can make the collection and then keep the money upon the ground that it could not have been re-

---

ported by merely theoretical conceptions of interference with the functions of government. Regard must be had to the substance and direct effects." *Helvering* v. *Mountain Producers Corp.*, decided March 7, 1928. Moreover, a state, as fully as a private litigant, must show an immediate and a tangible injury in order to attack as invalid an Act of Congress. *Massachusetts* v. *Mellon*, 262 U. S. 447; *New Jersey* v. *Sargent*, 269 U. S. 328; cf. *Alabama* v. *Arizona*, 291 U. S. 286; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70. The burdens of the tax collection cannot, we submit, reasonably be thought to be of sufficient weight to afford any ground for attack upon the federal statute.

quired to act as a collecting agent. That question may properly be reserved until such time, if ever, as the Federal Government seeks to impose a penalty upon State officers for failure to collect the Federal tax.

It results that, even if respondent were thought to be engaged in a governmental function in staging the football games, it has no standing to assert a constitutional immunity from this federal tax which is imposed upon its patrons alone. The tax has no effect on the State which entitles respondent to the relief which it seeks.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the lower court should be reversed, with directions to the District Court of the United States for the Northern District of Georgia to dismiss the bill of complaint.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

APRIL 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 500 (b) No tax shall be levied unde this title in respect of—

(1) Any admissions all the proceeds o which inure (A) exclusively to the benefit o religious, educational, or charitable institu tions, societies, or organizations, societies fo the prevention of cruelty to children or an mals, or societies or organizations conducte for the sole purpose of maintaining sym phony orchestras and receiving substanti support from voluntary contributions, or o improving any city, town, village, or othe municipality, or of maintaining a cooper tive or community center moving-pictu theater—if no part of the net earning thereof inures to the benefit of any priva stockholder or individual; * * *.

* * * * *

(d) The price (exclusive of the tax to b paid by the person paying for admission) a which every admission ticket or card is sol shall be conspicuously and indelibly printe stamped, or written on the face or back o that part of the ticket which is to be take up by the management of the theater, oper or other place of amusement, together wit the name of the vendor if sold other than a the ticket office of the theater, opera, or othe place of amusement. Whoever sells an ad mission ticket or card on which the nam of the vendor and price is not so printe

stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100. (U. S. C., Title 26, Secs. 941–944.)

SEC. 502 (a) Every person receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

* * * * *

(c) The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

(d) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. (U. S. C., Title 26, Secs. 955–957.)

SEC. 1102. (a) Every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of

the Secretary, may from time to time prescribe. (U. S. C., Title 26, Sec. 960.)

* * * * *

SEC. 1114. * * *

(b) Any person required under this Act to collect, account for, and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(d) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by Titles IV, V, VI, VII, VIII, and IX, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of section 3176 of the Revised Statutes, as amended, or for any offense for which a penalty has been recovered under section 3256 of the Revised Statutes.

(e) Any person in possession of property or rights to property, subject to distraint, upon which a levy has been made, shall, upon

demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(f) The term "person" as used in this section, includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(U. S. C., Title 26, Secs. 494, 856, 921, 958, 1047, 1127, 1155, 1610, 1693.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 711. ADMISSIONS TAX.

(a) Paragraph (1) of Section 500 (a) of the Revenue Act of 1926, as amended is amended to read as follows:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years of

age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscribed for a single admission is less than 41 cents;"

* * * * * *

(c) Section 500 of the Revenue Act of 1926, as amended, is amended by adding at the end thereof the following subdivision:

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States)."

* * * * * *

(U. S. C., Title 26, Secs. 940, 941.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 607. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States.

The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, Sec. 1551.)

Revised Statutes:

SEC. 3187 (as amended by Sec. 1016 of the Revenue Act of 1924, c. 234, 43 Stat. 343). If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. (U. S. C., Title 26, Secs. 1580.)

SEC. 3220 (as amended by Section 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and by Section 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791). Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully coected; aso to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-

revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Sec. 1670.)

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

SEC. 3226 (as amended by Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and by Section 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169). No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of

mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228 (as amended by Section 1112 of the Revenue Act of 1926, c. 27, 44 Stat. 9, by Section 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and by Section 1106 of the Revenue Act of 1932, c. 209, 47 Stat. 169). (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation

then in existence, shall not be allowed. (U. S. C., Title 26, Sec. 1433.)

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and power of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. (U. S. C., Title 31, Sec. 203.)

Judicial Code:

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (U. S. C., Title 28, Sec. 384.)

Act of February 13, 1925, c. 229, 43 Stat. 936, 941:

SEC. II. ACTION IF FEDERAL, ETC., OFFICER DIES WHILE SUIT PENDING

(a) That where during the pendency of an action, suit, or other proceeding brought by

or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (U. S. C., Title 28, Sec. 780.)

Treasury Regulations 43, promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928 and 1932:

ART. 5. *Regular or established price defined.*—By the "regular or established

price" of admission is meant the full-rate price fixed by the person controlling such price at the beginning of the first sale or distribution of tickets or cards valid on that occasion as the price to be charged for that particular class of admissions. The person in control has, of course, the power to fix the price actually to be charged for admission. He has, therefore, the power to determine the established or regular price. But as an established price is a matter of substance, not of name, the mere fact that he calls a price an established price does not make it such. The established or regular price of admission may be uniform as to all classes of admissions or may vary in accordance with the accommodations to which admission is granted, increasing from the price of a mere general admission through the various grades of accommodations to the best accommodations. Any scale of prices, adopted in good faith, in which the prices increase regularly with the increase of accommodation, will be considered to show the true established or regular prices of admission to such respective accommodations; but the variation of prices must be regular and based on a real difference of accommodation and not merely arbitrary. The established price of an admission need not be the same for different attractions or even for different performances of the same attraction; but when tickets have once been put on sale for a particular performance or attraction the price of admission for every accommodation at that performance or attraction has been established. Established prices of admission once so adopted are not affected by the mere sale of a few admissions at prices different from the ones so established. Established prices once adopted for any occa-

sion may not be thereafter increased for that occasion. If tickets are subsequently sold at a higher price, the excess charge will be taxable. Prices once established or adopted may be reduced, but in such case liability to excess-charge taxes with respect to all admissions sold at the original established prices can be avoided only by complying with the following conditions:

(1) Any reduction of established price must include all admissions of that particular established price and must grant an equal reduction in the case of each; (2) such reduction must not result in setting a lower price on admission to certain accommodations than is charged on that occasion under similar circumstances for admission to accommodations which are in all substantial respects similar; (3) public notice must be promptly given of the reduction and of the fact that every person having paid for admission at the former established price can secure a refund at any reasonable time of the amount he paid in excess of the new established price; and (4) such refunds must be actually made promptly on request.

The foregoing provisions of this article relate to single admissions, but they also control in the case of season tickets and subscriptions. The established price for a season ticket or subscription is the amount fixed (at the beginning of the sale of such ticket or subscription by the person controlling the price) as the price to be charged therefor.

The price (exclusive of the tax imposed under section 500 (a) (1)) at which every ticket or card of admission is sold must be conspicuously and indelibly printed, stamped, or written on the portion thereof

which is to be taken up by the management of the theater, opera, or other place of amusement for which it is valid. And if sold at a place other than the ticket office of the theater, opera, or other place of amusement the name of the vendor must also be shown.

ART. 29. *Requirements applicable to tickets.*—Where tickets or cards of admission are used, they must comply with the following requirements:

(1) The price (exclusive of the tax to be paid by the person paying for admission) at which every ticket or card is *sold* must be conspicuously and indelibly printed, stamped, or written on that part of the ticket which is to be taken up by the management of the place for which it is valid for admission. This is a specific requirement of the Act itself. For administrative purposes it is necessary to show not only the selling price but also (a) the regular or established price (see Art. 5), (b) the tax, and (c) the total of the price and tax. The regular or established price, the tax based thereon, and total shall appear on the *face* (in the case of strip tickets the back may be used) of the portion of the ticket which is to be taken up by the management in the following or equivalent form:

Established price---------- ------
Tax paid---------- ------
Total ---------- ------

If the ticket is sold at a price other than the regular or established price, the actual selling price, the tax based thereon, and the total shall be shown on the *back* of the portion of the ticket to be taken up by the management; and if the ticket is sold other than at the ticket office of the theater, opera, or other

place of amusement, the name and address of the vendor must also be shown on the *back* of the same portion of the ticket. For penalties imposed in this connection see article 56.

The foregoing applies primarily to *taxable* admissions. As no tax is imposed on admissions of less than 41 cents, it is only necessary that the price of such tickets (and the name of the vendor when required by the Act) be shown. This must be shown, since the requirements of the Act in this matter apply to "every admission ticket or card" without regard to the price for which it is sold. Where admissions are exempt on other grounds, the tickets should show that fact. This may be done in the following or equivalent form:

Established price ---------- ----
Tax free.

(2) The name of the place to which a ticket or card is valid for a taxable admission must in all cases be shown thereon. Moreover, tickets must either show the date for which they are valid or must be serially numbered. If serially numbered tickets are used, there must be a separate and distinct series for each established price. The numbers of each series must start with 1 and run continuously in regular order until 500,000 is reached, after which they may again start at 1 if so desired. In such case, however, a letter of the alphabet must precede or follow the serial number to distinguish the new series from the preceding series, and such letters must be used in turn until the alphabet is exhausted before starting again with the letter A. No place to which taxable admissions are sold shall have, or permit to be, at such place at the

same time two or more rolls or series of tickets of the same established price bearing identical serial numbers which are not distinguished by different letters of the alphabet. Serially numbered tickets must be issued consecutively in the order of the serial numbers, and the letters of the alphabet, if any, of that particular series.

Exceptions.—(a) Since tickets or cards of admission which are sold for less than 41 cents are not taxable, they need not be serially numbered or dated, nor need they have the name of the place to which they are valid printed thereon. They must, however, show the price.

(3) In the case of bona fide season or subscription tickets, a strip of tickets or a single ticket or card may be used to evidence more than one admission. In every other case, where several single admissions are sold or disposed of at one time, there must be separate or separable coupons to evidence each right to admission. Thus, in the case of combination tickets, issued by outdoor amusement parks, which entitle the holder to admission to a number of different attractions, there must be a separate ticket or coupon for each such attraction. Furthermore, each separate ticket or coupon must either be dated, or be serially numbered in accordance with requirements (1) and (2). If serial numbers are used on such combination tickets, each coupon thereof should bear the same serial number as the stub or cover of the ticket itself.

(4) No person shall be admitted, unless admitted free, to any place admission to which is taxable, and which uses tickets or cards, except upon the presentation of a card or ticket complying with the preceding

requirements. The ticket or card so presented or a portion thereof must be taken up, at the time of admission, by the management of the place, except in the case of a bona fide subscription or season ticket covering two or more admissions. Under ordinary circumstances the tickets or cards or portions thereof so taken up need not be preserved by the management of the place, but from time to time, on short notice from a collector of internal revenue or a revenue agent, the management must carefully preserve, until inspection by such officer, all tickets or cards or portions thereof taken upon the occasions designated in such notice.

* * * * *

ART. 54. *Abatement or refund of erroneous or illegal assessments or collections.*— A claim for the abatement or for the refund of any taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) must be filed by the person or organization against whom the taxes were assessed, or by whom such taxes were in the first instance erroneously or illegally paid. The claim should be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See sec. 3228, R. S., as amended.)

* * * * *

U. S GOVERNMENT PRINTING OFFICE: 1938

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 29 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1937

No. 882

MARION H. ALLEN, Collector
of Internal Revenue for the District of Georgia,
Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

M. J. Yeomans,
Attorney General of
the State of Georgia,

Marion Smith,
Special Assistant,
Attorney-General,
State of Georgia,

M. E. Kilpatrick,
Special Assistant,
Attorney-General,
State of Georgia.

P. O. Address:
1045 Hurt Building,
Atlanta, Georgia.

BLANK

PAGE

Supreme Court of the United States

October Term, 1937

No. 882

MARION H. ALLEN, Collector
of Internal Revenue,
Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

Respondent does not deny that the ultimate question of whether a Federal tax can be laid upon admission charges to athletic contests held by a State through its educational system is a question of importance. Nor does respondent deny that the related question of whether the Federal Government can force the State, or the State agency, to collect taxes for it, is also a question of importance. Frankness on our part in dealing with the Court requires this definite statement to be made. It would, however, not follow necessarily that a writ of certiorari should be granted. We believe the decision of the Circuit Court of Appeals is in accord with well settled principles. This Court may feel, however, that the question is of sufficient importance to justify a further decision by this Court. As to this we express no definite view since, necessarily, it would depend upon the extent of pressure upon the Court's time of other

and more important or more doubtful matters.

The purpose of this response is primarily to request the Court, should it determine to grant the writ of certiorari, to provide in its order that the scope of review be limited to the two questions indicated, namely: (1) Whether the Federal amusements tax can be levied upon admissions to athletic contests held by a State agency conducted as a part of the State's educational program under the facts and circumstances of this record; and (2) whether the Federal Government can force such State agency to act as its collecting agent with respect thereto.

*In the margin are noted precedents from this Court following the practice of limiting the scope of review on certiorari.

The necessity for limiting the review in this case grows out of the following:

The Government, while purporting to desire the fundamental questions here involved to be settled as rapidly as possible, has at the same time throughout the entire history of this case endeavored to prevent a decision on the merits. Indeed, it is not too much to say that this record discloses an effort to avoid a decision on the merits by raising every possible procedural question having no relation to the ultimate merits. It further discloses that the representatives of the State of Georgia have been struggling throughout the litigation to arrive at a determination of the basic questions.

---

*Brown v. Commissioner, 290 U. S. 607; City of Lincoln v. Ricketts, Trustee, 296 U. S. 566; Commonwealth Trust Co. v. Atwood, 296 U. S. 566; Pacific Coast Steel Co. v. McLaughlin, Coll., 287 U. S. 595; Shumacher v. Beeler, 293 U. S. 544; U. S. Shipping Board Corp. v. Rhodes, 296 U. S. 568; Van Der Weyde v. Ocean Transport Co., 296 U. S. 567.

For example: Before this litigation commenced the Regents of the University System of Georgia first endeavored to raise the question by paying in an amount equal to the tax then claimed and filing a claim for a refund. They were met by a decision of the Treasury Department that such procedure was improper and that a claim for a refund could not be considered because the Regents of the University System of Georgia was not the taxpayer but in the relation of a collecting agency. (R. pp. 22, 154, 320 thru 328.)

Thereupon, having no other possible remedy, the respondent herein brought its suit in equity in an effort to raise the question by restraining the collection of further amounts. Whereupon the Government immediately presented the wholly inconsistent claim that respondent could not sue for equitable relief since it had a remedy by paying in the alleged tax and seeking a refund. This position has been pressed by the Government throughout the litigation, in total disregard of the fact that respondent had attempted to pursue that remedy and had been refused the same upon the ground that it was not an available remedy, in which respondent was obliged to acquiesce.

Furthermore, the Government has sought to prevent a decision on the merits by the claim that respondent had voluntarily collected a tax for the Government and hence could not retain the fund so collected. This, notwithstanding the fact that each ticket sold by respondent bore upon the face thereof the following:

> "The University of Georgia being an instrumentality of the government of the State of

> Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury Regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

As another example of the effort to avoid a decision on the merits by procedural questions respondent points out that while this case was pending in the Circuit Court of Appeals the Collector of Internal Revenue, against whom the action was brought, resigned his office and a successor was appointed. Respondent thereupon moved to substitute the successor pursuant to Section 780 of Article 28 of the U. S. Code. The Government thereupon objected to the substitution and asserted that the whole proceeding had become moot and an entirely new suit must be brought in the District Court against the new Collector. The proceedings in this respect in the Circuit Court of Appeals are shown in the Record, pp. 447 thru 452.

And as a final example, respondent refers to the petition for certiorari now before the Court in which it is sought to have all of these procedural questions reopened and reviewed in this Court.

We do not believe that any of the procedural questions raised are well founded. We believe the decision of the Circuit Court of Appeals, when this case was first before it (81 Fed. (2) 577), is entirely sound, in which that court pointed out that there was no other way known to the law whereby a branch of the State

government, seeking to raise these questions, could proceed except the method followed by respondent in this case. But it is respectfully submitted that if any of these technical questions of procedure are well founded they would not be of sufficient moment to justify the granting of a writ of certiorari. Hence, if the writ is granted it necessarily would be solely for the purpose of reviewing the merits relative to this controversy on the issues heretofore pointed out. In that situation it would be exceedingly unfortunate for any technical question of procedure to frustrate the whole purpose for which the writ was granted. Therefore, we respectfully insist that the present case is typical of the kind in which the Court should restrict the scope of the review to those questions, and those only, which justify the granting of the writ.

Respectfully submitted,

M. J. Yeomans,
Attorney General of
the State of Georgia,

Marion Smith,
Special Assistant,
Attorney-General,
State of Georgia,

M. E. Kilpatrick,
Special Assistant,
Attorney-General,
State of Georgia.

P. O. Address:
1045 Hurt Building,
Atlanta, Georgia.

BLANK

PAGE

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

Office Supreme Court, U. S
FILED
APR 26 1938
CHARLES ELMORE CROPLEY
CLERK

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

M. J. YEOMANS,
Attorney General of the State of Georgia.
MARION SMITH,
Special Assistant Attorney General of the State of Georgia.
M. E. KILPATRICK,
Special Assistant Attorney General of the State of Georgia.
HAMILTON LOKEY,
Special Assistant Attorney General of the State of Georgia.

BLANK

PAGE

INDEX.

Subject Index.

Part One.

	Page
The effort to enforce the tax against the State agency cannot be sustained	2
Syllabus of the argument	3
Regents of university system a public instrumentality of the State government	4
Public education is a governmental function	10
The holding of athletic contests integral part of program of education by the State of Georgia	11
Educators regard athletic contests as sound part of program of physical education	24
The means by which the State carries out its program of education are for determination of State authorities, not subject to review by Federal government	24
State activity does not cease to be governmental because it produces some revenue	30
The tax is directly on a State activity and directly burdens that activity. The burden of collecting the tax is on the State agency	31

Part Two.

Procedural Questions.

Application for writ of certiorari raises three procedural questions	37
Record shows respondent has collected no taxes for Federal Government	37
Respondent endeavored to raise question for prior period and Treasury Department held refund procedure invalid	38
Admission tax statute provides sèvere penalties for refusal to collect	39
Treasury regulations require statement of established price and tax paid	39
Respondent should not be subjected to possibility of criminal penalties before afforded opportunity to contest validity of statute	39
Principle particularly applicable to State officials	40
Respondent placed notice on ticket advising patrons entire amount collected as admission	40
Circuit Court Appeals correctly construed provision that no tax collected	40
Revised Statute 3224 does not prevent equitable relief in exceptional and extraordinary cases	42

Page

Present case discloses many exceptional and extraordinary circumstances:
(a) The effort here is to impose a penalty on a sovereign State and to seize funds belonging to the State 43
(b) The assessments here were not against respondent but were levied on funds held by respondent for the State of Georgia. Hence, if respondent had paid the assessments it would have had no standing to seek a refund 43
(c) R. S. 3224 does not apply where penalties, as distinguished from taxes, are involved 43
(d) Respondent could not have sought a remedy by collecting a tax, paying it over to the government and seeking a refund because in that event its acquiescence in acting as a collecting agency would have barred its rights 43
(e) Further, respondent could not have attempted that procedure by paying from its own funds the equivalent of the tax because the tax is not laid against it but against the patrons. Only a taxpayer can sue for refund 43
(f) Even if respondent could have secured a return of funds in this way, it would not thereby have been accorded an adequate remedy because it would have imposed on it the burden of acting as a Federal collecting agency, which burden cannot be imposed upon a State without its assent 43
(g) Also, such procedure would not accord an adequate remedy even if it could be followed because it would impose upon respondent an obligation to collect from patrons alleged taxes not in fact due the Federal Government. State officials should be relieved of such inequitable requirements 43
(h) The State is entitled to a remedy by injunction which will relieve its funds from liens and relieve it of a multiplicity of suits 44
Substitution of successor collector clearly authorized by Section 11 of the Act of February 13, 1925 60

TABLE OF CASES, TEXT BOOKS AND STATUTES.

Alliance Country Club v. *United States*, 62 Ct. Claims 579 50
Alward v. *Johnson*, 282 U. S. 509 33
Ambrosini v. *United States*, 187 U. S. 1 32
Anderson v. *Board of Education*, 190 N. W. 807, at p. 809, 49 N. D. 181 23
Arizona v. *California*, 283 U. S. 423 27
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ..... 28, 29
Bernadin v. *Butterworth*, 169 U. S. 600 61
Brushaber v. *U. P. Railway*, 240 U. S. 1 42
Builders Club of Chicago v. *U. S.*, 14 Fed. Supp. 1020 (Ct. of Claims) 51
Bunker Hill Country Club v. *U. S.*, 9 Fed. Supp. 52 50

	Page
Burnet v. *Coronado*, 285 U. S. 393	35
Bush v. *Commissioner*, 300 U. S. 352, at 364	25, 30
Collector v. *Day*, 11 Wall. 113	25, 32
Congressional Country Club v. *U. S.*, 44 F. (2d) 266	50
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163	28
Flint v. *Stone-Tracy Co.*, 220 U. S. 107	27
Florida v. *Mellon*, 273 U. S. 12	44
Fontenot v. *Accardo*, 278 Fed. 871	54
German Gym. Asso. v. *Louisville*, 117 Ky. 958, 80 S. W. 201	21
Gillespie v. *Oklahoma*, 257 U. S. 501	35
Graves v. *Texas Co.*, 298 U. S. 393	33
Hamilton v. *Kentucky Distilleries*, 251 U. S. 146	28
Helvering v. *Mountain Producers Corp.*, 82 Adv. Op. 607, 58 Sup. Ct. 623	35
Hill v. *Wallace*, 259 U. S. 44	42
Hubbard Investment Co v. *Brast*, 59 F. (2d) 709	48
Huohs v. *Backer*, 6 Hask. 395, 19 Am. Rep. 398	22
Indian Motor Cycle Co. v. *United States*, 283 U. S. 570	33
James v. *Draco Contracting Co.*, 302 U. S. 134	34
Kentucky v. *Dennison*, 24 How. 66	36
La Fayette Worsted Co. v. *Page*, 6 F. (2d) 399, 400	50
La Prade, Ex parte, 289 U. S. 444	62
Liggett & Myers Tobacco Co. v. *United States*, 299 U. S. 383	34
Lion Coal Co. v. *Anderson, Collector*, 62 F. (2d) 325, 328	48
Lipke v. *Lederer*, 259 U. S. 557	54
Livingston v. *Becker*, 40 F. (2d) 673	48
Long v. *Rasmussen*, 281 F. 236	48
Masonic Country Club v. *Holden*, 18 F. (2d) 553	50
McCray v. *United States*, 195 U. S. 27	27
McCullough v. *Maryland*, 4 Wheat. 316	2
Miller v. *Standard Nut Margarine Co.*, 284 U. S. 498	42
Mokovich v. *Independent School Dist.*, 225 N. W. 292, 177 Minn. 446	21
Mt. Herman Boys School v. *Gill*, 145 Mass. 146, 13 N. E. 354	21
New York v. *Graves*, 299 U. S. 401	30
Ohio v. *Helvering*, 292 U. S. 360	44
Oklahoma Operating Co. v. *Love*, 252 U. S. 335	39
Osborn v. *Bank of the United States*, 9 Wheat. 738	31
Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218	33
Pennsylvania v. *Fix, Collector*, 7 Fed. Supp. 729	45
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 442	42
Regal Drug Co. v. *Wardell*, 260 U. S. 386	54
Regents v. *Page*, 81 F. (2d) 577	
Reiger v. *Board of Education*, 287 Ill. 590, 122 N. S. 838 at p. 839	22
Rickert Rice Mills v. *Fontenot*, 297 U. S. 110	42
Shhannopin Country Club v. *Heiner*, 2 F. (2d) 293	49
Smith v. *Kansas City Title & Tr. Co.*, 255 U. S. 180	26
South Carolina v. *United States*, 199 U. S. 437	3

	Page
Southern Bell Tel. & Tel. Co. v. *Calhoun*, 287 Fed. 383	39
Spencer v. *School District*, 254 Pac. 357, 121 Ore. 511	23
State of Ga. v. *Regents*, 179 Ga. 210, at 218	9
State ex rel. School Dist. v. *Superior Court*, 124 Pac. 484, 69 Wash. 189	22
Texas v. *White*, 7 Wall. 700	2, 25
Trinacia Real Estate Co. v. *Clarke*, 34 F. (2d) 325	48
Union Pacific Rwy. v. *Bowers*, 33 F. (2d) 102	49, 51
United States v. *Baltimore & Ohio R. Co.*, 17 Wall. 322	25
United States v. *Doremus*, 249 U. S. 86	28
United States v. *First Capitol Natl. Bk.*, 89 F. (2d) 116	56
United States v. *River Rouge Improvement Co.*, 269 U. S. 411, 419	28
Veazie Bank v. *Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482	27
Weber v. *Freed*, 239 U. S. 325	28
Weston v. *Charleston*, 2 Pet. 449	32
Wheeler Lumber Bridge & Supply Co. v. *United States*, 281 U. S. 572	32
Wilson v. *Ill. Sou. Rwy. Co.*, 263 U. S. 574	42
Wilson v. *New*, 243 U. S. 332	28
Wourhack v. *Becker*, 55 F. (2d) 840, Cert. denied, 286 U. S. 548	50
Young, Ex parte, 209 U. S. 123	39
Acts 1783 (Ga.)	5
Acts 1784 (Ga.)	5
Acts 1785 (Ga.)	5, 10
Acts 1884-85 (Ga.) p. 69	6
Acts 1931 (Ga.) p. 7	6
Acts 1933 (Ga.) p. 61	7
Acts 1933 (Ga.) p. 62	7
Acts 1935 (Ga.) p. 171	10
Acts 1935 (Ga.) p. 177	7
Administration of Health & Physical Education, Ch. 17, p. 405	64
Admission Tax Regulations, Chap. 10, No. 43	54
Athletics in Education, p. 56	66
American Asso. of University Professors, 1926, Vol. 12, No. 4	68
Code 1933 (Ga.) Title 32, Ch. 1	6
Higher Education in America, Ch. 19	67
Marbury and Crawford Digest, p. 132	5
Marbury and Crawford Digest, p. 560	4
Proceedings National Collegiate Athletic Asso., 1919, p. 81	69
Proceedings National Collegiate Athletic Asso., 1924, p. 87	70
Proceedings National Collegiate Athletic Asso., 1925, pp. 96 and 97	68
Proceedings National Collegiate Athletic Asso., 1927	70
Proceedings National Collegiate Athletic Asso., 1934, p. 95	67
Reports of the Georgia Bar Asso. of 1927, p. 256	8
Revenue Act, 1926, Sec. 500a	53
Revenue Act, 1926, Sec. 1114	52
Revenue Act, 1926, Sec. 1114(d)	54
Revenue Act, 1928, Sec. 411a	53
Revenue Act, 1928, Sec. 619(d)	52

	Page
Revenue Act, 1932, Sec. 711a	53
Treasury Regulations 42, Article 29	39
U. S. C. A., Title 26, Sec. 154	42
U. S. C. A., Title 26, Sec. 940	53, 57
U. S. C. A., Title 26, Sec. 942	39
U. S. C. A., Title 26, Sec. 955 (a)	53
U. S. C. A., Title 26, Sec. 956	53
U. S. C. A., Title 26, Sec. 958 (b)	39
U. S. C. A., Title 26, Sec. 958 (c)	52
U. S. C. A., Title 26, Sec. 1560	59
U. S. C. A., Title 26, Sec. 1561	59
U. S. C. A., Title 26, Sec. 1610	56
U. S. C. A., Title 28, Sec. 780	60
Watkins Digest, p. 290	5
Watkins Digest, p. 299	5

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

BRIEF FOR RESPONDENT.

The writ of certiorari was granted in this case April 11, 1938, and we were at that time advised by the Clerk that the case would be reached for argument at the end of April. It is, therefore, not possible for us to delay the preparation of this brief until after it would be possible for the petitioner's counsel to serve their brief upon us. In that situation it is not possible to include in this brief any reference to the statement of facts that may be included in the brief of petitioner. After we are served with petitioner's brief, should we determine to present any statement relative to petitioner's statement of facts, we

will request permission to file a supplemental brief for that purpose.

Necessarily, also, we must assume in the preparation of this brief that the argument for the petitioner will proceed along the general lines of the argument in the lower courts, and on the points outlined in the petition for a writ of certiorari.

Broadly, the problems in this case may be divided into (1) the fundamental question of whether the Federal Amusements Tax can be levied on the admissions to the athletic contests held by the State agency and whether such State agency can be forced to collect the tax which will be dealt with in Part 1 of the brief; and (2) procedural questions which will be dealt with in Part 2.

Part One.

The Effort to Enforce the Tax Against the State Agency Cannot be Sustained.

It is not necessary to consume time or space in discussing the proposition that state and federal governments are each immune from taxation by the other, and that this immunity extends to the agencies of each performing governmental functions. The immunity of federal agencies was established in *McCullough* v. *Maryland,* 4 Wheat, 316. The immunity of state agencies was established in *Collector* v. *Day,* 11 Wall, 113. From then on through the latest decisions of this Court the fundamental principle has never been questioned. The principle is implied from the independence of the national and state governments within their respective spheres. It applies just as much to the states as it does to the national government, since "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." (*Texas* v. *White,* 7 Wall, 700.)

Starting with this basic proposition, the decisions of this Court have developed certain additional rules that are here applicable. It is admitted that the immunity applies only to those state activities which are governmental in character, and not to those that are merely commercial. For example, when South Carolina determined to conduct the sale of intoxicating liquors as a state activity, such transactions, not being governmental in their nature, were subject to Federal taxation. (*State of South Carolina* v. *United States*, 199 U. S. 437.)

The first question therefore on the merits of this case is whether the activity here involved is governmental in its nature, or merely a commercial venture on the part of the State of Georgia.

The second inquiry on the merits arises out of the rule that in order for the claim of immunity to be sustained the imposition must bear directly on the state or on a state activity. The question here has usually arisen where some private interest has claimed immunity from some Federal levy because it was connected in some way with transactions between the private interest and the state. As will appear more fully in the discussion, late cases from this Court have definitely limited the extent to which private interests may thus claim immunity from Federal taxation where such tax is only indirectly or remotely connected with state activity. The second question here then would be: Assuming that it can be shown that the holding of such athletic contests is a governmental function, does the tax bear directly on the performance of such function or does the requirement that a state agency shall collect the tax constitute a burden upon the state?

The syllabus of the argument to be here presented is as follows:

1. Regents of the University System of Georgia is a public instrumentality of the State government, carry-

ing out a part of the State's program of public education.

2. Public education is a governmental function.

3. The holding of athletic contests is an integral part of the program of public education conducted by the State of Georgia.

4. The majority of educators regard athletic contests as a sound part of a program of education.

5. The means by which the State carries out its program of public education are in all respects for determination by the State authorities, and their determination is not subject to review by any branch of the Federal government.

6. State activity does not cease to be governmental because it produces some income.

7. The tax is imposed directly on the State activity and directly burdens that activity. The burden of collecting the tax is imposed immediately on a State agency.

1.

Regents of University System a Public Instrumentality of the State Government.

The status of Regents of the University System of Georgia is a matter of law settled by the statutes of that State. It is a public governmental corporation created by law in 1785 under the name of "Trustees of the University of Georgia." The name was changed in 1931, but the present public educational corporation is the same entity which has existed continuously since its creation by the Act of 1785.

The act here referred to is found in Marbury and Crawford's Digest, beginning at page 560, and also in Watkins'

Digest, beginning at page 299. It is entitled "An act for the more full and complete establishment of a public seat of learning in this State." The use of the word "more" is explained by the fact that while no institution had been specifically created before the Act of 1785 there had been earlier legislation setting aside public lands for the purpose of having them disposed of and a public institution of learning created. (See *Marbury and Crawford Digest*, p. 132, where the Act of 1783 is published, and *Watkins' Digest*, p. 290, where the Act of 1784 is published; both of which provide for setting aside public lands for higher education.)

The Act of 1785 provided for the creation of the Trustees of the University of Georgia; and provided in the 3rd section—"they are hereby constituted a body corporate and politic by the name of Trustees of the University of Georgia, by which they shall have perpetual succession," etc.

It is, of course, a matter of general history that in 1785 public school systems were wholly unknown. It seems to have been the contemplation of those creating the University at that time that all public education, including the kind we now refer to as the common schools, would be under the Trustees of the University of Georgia. The Fourteenth Section of the Act is as follows:

> "All public schools instituted, or to be supported by funds or public moneys in this State shall be considered as parts or members of the University and shall be under the foregoing directions and regulations."

It is also a matter of history that when common schools were established in Georgia this original purpose of placing them under the control of the University of Georgia was not followed; but whenever any other public institution for higher education was created in that State it was established as a branch of the University of Georgia, although

up to the year 1931 the different branches were under separate boards of Trustees. The only branch with which we are interested in the present case is the Georgia School of Technology. This was created as a branch of the University of Georgia by the Act of October 13, 1885, published in Acts of 1884-85, p. 69.

In 1931 the State of Georgia passed an act for the general reorganization of the State government which is commonly known as the Reorganization Act (Acts 1931, p. 7). The portion of that act dealing with the reorganization of higher educational institutions in the State is printed in the Code of 1933, Title 32, Chapter 1. All separate boards of trustees for different branches of the University System were abolished and the management, government, and control of all state institutions of higher education in Georgia was vested in the Board of Regents of the University System of Georgia. By § 32-101 of the Code this Board was "constituted a department of the State government of Georgia." By the same section "the name of the corporation heretofore established and existing under the name and style 'Trustees of the University of Georgia' is hereby changed to 'Regents of the University System of Georgia.'"

By § 32-102 it was provided that "the university system of Georgia shall consist of the University of Georgia and all of its branches."

§ 32-103 lists the branches of the university system in existence when the reorganization act of 1931 was passed. It should be noted, however, that under authority given to the Board of Regents by § 32-116, § 32-124, and § 32-126, to discontinue institutions and reorganize the system, drastic reoganizations were made. This reorganization is set out in the editorial note following § 32-103 and is not repeated here. Its only materiality on the present case is in the fact that the Georgia School of Technology of Atlanta was continued as one of the institutions in the university system.

Under § 32-104 the members of the Board of Regents are appointed by the Governor and confirmed by the Senate. Their terms of office are fixed by law in § 32-105.

Then follow sections relating to the officers of the board, its meetings, etc.; all of which are fixed by law. It is not material to recite these matters in detail. It is important, however, to bear in mind that the whole subject is regulated by State statutes.

The Act of 1933 (Acts 1933, p. 62) granted to the Board of Regents power "to consolidate, suspend, and/or discontinue, institutions; merge departments, inaugurate or discontinue courses and abolish or add degrees." It was under this authority that the reorganization above referred to was effected.

Another act of the same year (Acts 1933, p. 61) gave to the Board of Regents power to reallocate and distribute all appropriations made for the support of the university system or any of its branches.

In 1935 the General Assembly passed an act "to define the status of the Regents of the University System and the members of the Board of Regents of the University System; to declare the State's title and ownership of the property held by the Regents of the University System," etc. (Acts 1935, p. 177).

It is apparent from the language of the act and from the history of the subject matter that it was in the main merely declaratory of a legal status that already existed. The first section provides that the corporation mentioned in § 32-101 of the Code "and known as 'Regents of the University System of Georgia' is hereby declared to be a governmental agency of the State of Georgia, and all property held by said corporation under said act of August 25, 1931, as embodied in Title 32 of the Code of Georgia of 1933, is hereby declared to be the property of the State of Georgia. * * * The members of the Board of Regents of the University System

of Georgia, as provided by said act, are hereby declared to be public officers of the State of Georgia," etc.

We believe it apparent that this is merely a statement of what already existed under the law of this State. Indeed, it is apparent from the language of the act that it is intended to be in this respect declaratory of an existing status. As heretofore pointed out, the Board of Regents had already been declared to be a department of the State government of Georgia. Its members were necessarily public officers of the State of Georgia, and the title to the property, while in a body corporate under Georgia law, was necessarily held for the State of Georgia, to which its ultimate ownership belonged.

§ 3 of the Act of 1935 relates to the method of handling fees and other revenue of the different institutions including "proceeds of athletic contests" and ends with the statement that "all such revenue is declared to be under the control of the Board of Regents, which control may be exercised directly or through such athletic associations or organizations as it may authorize, provided such associations and organizations remain always subject to the control of the Board of Regents."

No change in the existing status was made by this provision. The control of the Board of Regents in the respect indicated was plenary under previous laws and was not questioned. The provision last quoted, however, is important in one respect, namely, as embodying a legislative approval of the policy theretofore followed by the Board of Regents of handling the management of athletic contests, in some respects at least, through the medium or agency of athletic associations.

A complete and detailed review of the whole history of the university system of Georgia up to the year 1927 is found in the reports of the Georgia Bar Association for that year,

commencing on p. 256, in an address by Chief Justice Richard B. Russell, under the title "The Legal History of the University of Georgia."

In *State of Georgia* v. *Regents, etc.*, 179 Ga. 210, the court on page 218 says:

> "It is thus seen that the Regents of the University System of Georgia is a distinct corporate entity, though controlled by a 'Board of Regents *which is designated as a department of the State government.*'" (Italics by us.)

Again on page 218 the court says:

> "The Legislature does not pretend to govern the system, but has intrusted this responsibility to the Board of Regents."

On p. 219 the court says:

> "It may be conceded that *the State is the equitable and beneficial owner of all property now vested in the Regents of the University System,* and that the corporation by that name is the holder only of the legal title." (Italics by us.)

The use of a separate corporate entity created by statute as a mere instrumentality of government is certainly not a strange thing at the present date. The Federal Government uses many such corporate agencies which are uniformly exempt from State taxation, except where the Federal Government itself has consented to such taxation. As illustrations of this we mention:

National Banks,
Federal Reserve Banks,
Reconstruction Finance Corporation,
Federal Intermediate Credit Banks,
Home Owners Loan Corporation,
Commodity Credit Corporation,

Electric Home & Farm Authority,
Export-Import Bank of Washington,
Federal Land Banks,
Production Credit Corporation,
Banks for Cooperatives,
Federal Deposit Insurance Corporation,
Federal Savings & Loan Insurance Corporation,
The Tennessee Valley Authority,
Textile Foundation, Inc.,
War Finance Corporation.

In its opinion in this case the Circuit Court of Appeals, after referring to the Act of 1785 chartering "Trustees of the University System of Georgia" now, as pointed out, "Regents of the University System of Georgia", says:

> "The University of Georgia as a seat of higher learning with branches in many parts of the State has remained imbedded in the Constitution and the statutes of the State ever since. The State of Georgia thus came into the Federal Union with this University declared as a part of its governmental activity."

Later the court says:

> "That the Regents are public officers and the funds they raise are public moneys, and specifically those raised by the athletic associations such as are here involved, was emphatically declared by the Legislature in the Act of 1935. Acts 1935, page 171. There can be no doubt that the Board of Regents and the instrumentalities which they employ, including the athletic associations, are governmental agencies of education."

2.

Public Education is a Governmental Function.

We believe this proposition to be self-evident and that the attempted distinction in this respect, that higher edu-

cation is not a governmental function, is not of sufficient weight to justify discussion. With reference to it, the Circuit Court of Appeals said (R. 434):

> "There is a faint contention made here that higher education is not a legitimate governmental function, though common schools are admitted to be necessary to the success of a democracy. It is true that historically higher education in America was for a long period furnished by church seminaries and privately endowed and operated colleges; but this was due to the lack of public funds and not to a failure to recognize that highly educated leaders are also necessary to the success of democracy. George Washington himself urged and sought to found a college for higher education in Virginia, and Thomas Jefferson pushed the idea to fruition in Virginia's University. Even before this, Georgians were pressing the matter."

3.

The Holding of Athletic Contests Integral Part of Program of Education by the State.

The Circuit Court of Appeals in this case has held that the above proposition is clearly established by the facts in this case (R. 436). Under this division of the brief we wish to point out the facts shown by the record in this respect. As to them, there is absolutely no conflict. We are not at this point concerned with whether the State of Georgia should have included athletic contests in its educational program. At another point of the brief we will endeavor to show that the inclusion of such contests in a program of education is in accord with the views of most educators of standing in this country. We will also at another part of the brief endeavor to show that whether Georgia should include such matters in its educational program is wholly for the decision of the State authorities.

At this particular point, however, we narrow the discussion to the facts in this record with a view of showing that beyond any doubt in actual fact the responsible authorities of the State of Georgia have in fact consistently taken such action; and that as to this there is no dispute.

The opposing argument seems to be centered around two ideas: One, that since inter-collegiate football contests have in some instances produced large revenue, the State of Georgia must be considered as holding those contests for the purpose of revenue only; and, Two, a relatively small percentage of the college students participate in inter-collegiate football games. Both of these arguments overlook the fact that inter-collegiate football games are merely a part of an entire program which uses athletic contests as a part of the program. They also overlook the fact that it is only in relatively late years that inter-collegiate football has been a source of revenue but that for many years these games were held by the State authorities when they were not even self-supporting. Certain of the facts are summarized by the Circuit Court of Appeals in its opinion as follows (R. 436):

> "That the Board of Regents have both at the University at Athens and the Technological School at Atlanta made physical education an integral part of the University's function, and that they authorize and supervise public exhibitions for which admission is charged as a part of the program admits of no doubt. The formal catalogues and bulletins of both institutions set forth at length the opportunities and the requirements for physical education. At Athens all students, male and female, are required to take two years of such education, military drill for males being recognized as equivalent. One teaching degree includes sports in its curriculum, being designated to qualify graduates not only to teach in the State High Schools but to direct the physical education in such

schools. In both institutions the head of the Department of Physical Education holds the office of Dean of Men in the faculty. Other instructors, often called 'coaches', are also members of the faculty. The conduct of athletic contests and the qualifications of contestants are regulated by faculty rules approved by the Regents and are related to scholastic standing. The schedule of contests for each year is approved by the faculty and by the Regents. Their details are handled at each institution by an Athletic Association composed of faculty members and alumni and incorporated to facilitate such business transactions as the improvement of the athletic grounds and equipment. They are wholly under control of the Regents and are their agents. The Chancellor of the University System is himself president of the Athletic Association at Athens. The taxes here in question were assessed against these associations, and the pleadings of the Collector insist that the associations are to be considered separate from the Regents of the University System, but that position is untenable and has been abandoned in argument. The tickets which gave rise to the tax show on their face that they were sold for the University for they state that the University of Georgia contends that there is no liability to the tax, but the University is collecting the fourteen cents as a part of the charge of admission and will retain it as such if a tax is not collectible. The money from admissions is, like all other funds of the associations, audited by the State Auditor, and as already stated was claimed specifically as the State's by the State Legislature itself in the Act of 1935. The highest State governmental authority has thus ratified the use of the associations and the charge for admissions to the games as proper functions of the University."

No one makes a profit out of athletics at either institution. Salaries, of course, are paid to coaches, trainers, doctors, and the like, but they are fixed and reasonable. No percentages of any kind are allowed (R. 181).

Football is only one of the inter-collegiate contests. Such contests with other colleges are held also in base ball, soft ball, track, tennis, swimming, polo, basket ball, golf and boxing. An admission is charged to all of these contests and if the admission exceeded Forty (40¢) cents they would all be subject to Federal taxation. At the University of Georgia almost one-third of the student body participate in some form of inter-collegiate contests (R. 162). Looking only to football, there are from 135 to 160 men at the University of Georgia who participate in the football squad, either as members of the team or those seeking such membership and thus receiving the benefit of the training involved (R. 173). There are no figures in the record as to how many students take Greek as an example for comparison, but we believe it to be a fair guess to say that it would be a smaller figure which would not, we think, prevent Greek being considered an educational function. Also, intra-mural contests must be considered. These are athletic contests and admissions are charged or can be charged for spectators at such intra-mural contests. If these admissions exceed Forty (40¢) Cents per ticket they would be subject to a Federal Amusement Tax and if the principle of the tax should be sustained it would be within the power of the Federal Government to tax them, regardless of the price at which the admissions were sold. At the University of Georgia three-fourths of the student-body participate in intra-mural athletic contests of some kind (R. 162), and at the Georgia School of Technology eighty (80%) per cent of the students participate in some form of athletic contest (R. 199).

A fair view, therefore, of inter-collegiate football games must look upon them as a part of the general program to stimulate general participation in athletic contests of one kind or another and which succeeds to the extent of three-fourths or more of the student-body.

It is true that at the present time these football contests produce a large revenue, but this has not always been true. Inter-collegiate football was, as pointed out, carried on for many years when it was not even self-supporting and when it could not have been conducted at all except for the receipts from base ball contests (R. 233). The situation has now changed: Baseball contests do not attract crowds at the present time but football contests do so that at the present instead of football contests being supported by the receipts of other forms of athletic activities, now the receipts from football are what enable the State authorities to continue the other parts of the athletic program (R. 233).

Surely the fact that the public now attends these contests in larger numbers than formerly can not have the effect of taking them out of the program of physical education, in which they were started and conducted for many years at a loss, and changing them into mere commercial activities. Any such theory would lead to ridiculous results. It would lead to the conclusion that inter-collegiate baseball was not a part of the program of physical education when it was paying large returns because of its general popularity but that the same inter-collegiate sport had become a part of the program of physical education when the public ceased to patronize it largely and it was continued at a loss. Track, basketball, boxing, swimming, etc., now conducted at a loss, would be regarded as parts of a program of physical education but whenever the popularity of one of these sports increased with the public it would, under the Government's theory, cease to be a part of the program of education and become a commercial venture.

On the same theory let us look a little more closely at the status of football contests. During the many years that they were conducted at a loss they would be regarded as a part of the program of physical education but would, according to the Government, have lost their status since the reve-

nue from them had grown; but, at just what point would this change occur? Would it occur at the exact point when the revenue exceeded the expenses? Or would some definite figure or percentage have to be reached before the character of the activity was changed into a mere commercial venture?

All of this, of course, means that the record in this case shows conclusively that inter-collegiate football contests must be looked at in the light of their history and as a part of an entire program and that when so looked at their status has not been changed by reason of the fact that in late years public attendance at them has greatly increased.

It should be admitted readily that this large increase in attendance has raised serious problems with which educational authorities must deal. In another division of this brief views of educators on this point are referred to. The Circuit Court of Appeals in this case has pointed out the danger inherent in such a situation (R. 437). It is also pointed out that this increased popularity has led in some instances to an abuse of scholarships amounting in effect to hiring players (R. 438). All students of education recognize such dangers and the possibility of such abuses. It is conceivable that they might go into such an extent in a given instance as to justify the Court in holding that such athletic contests had degenerated into mere commercial ventures. It is important to point out here, therefore, that with reference to this the Circuit Court of Appeals says:

> *"There can be no such charge made against the Management of the Regents as exhibited in this record."*

The facts on which this finding is based should be stated a little more fully. Counsel representing the Government undertook in the trial of this case to inquire into the extent to which scholarship aid of any kind was received by students participating in inter-collegiate football. Whenever such question is raised the only possible course to pursue

is to give completely, fully and exhaustively the entire facts on the subject, and this we have endeavored to do in this record.

The regulations for the guidance of undergraduate students at the University of Georgia cover the question of the eligibility of students from the standpoint of scholarship, etc., to participate in these contests (R. 248). The whole matter is, in fact, regulated in the first instance by the Conference Rules of the Southeastern Conference which are published as a part of this student guide and made binding by the University faculty (R. 249). Under these regulations, both of the conference and of the University, no student can participate in an inter-collegiate sport who does not meet the scholastic and attendance requirements or receives any gift or remuneration other than a scholarship or a loan through the Faculty Committee (R. 250). A pledge of compliance with these rules is required (R. 251). The catalog of the University, under the heading "Department of Physical Education" lists the various coaches as members of the faculty (R. 251), and repeats the requirements set out in the Guide for Undergraduates (R. 260, 261 and 262).

The situation is substantially the same at the Georgia School of Technology (R. 283, *et seq*).

At the University of Georgia scholarship and student aid of one kind or another is furnished to in excess of Nine Hundred (900) students attending the University (R. 229). Notwithstanding the fact that the football squad, as heretofore pointed out, consists of from 135 to 160 students, there were only between 20 to 30 of that group who received scholarship aid of any kind (R. 242). While we have been unable to find the total enrolment of the University in the record, there is certainly no reason to suppose from the above figures that the percentage of the football squad

who received scholarship aid was any larger than the percentage of the entire student body.

The situation is substantially the same at the Georgia School of Technology. Between 18 and 20 students who played football received scholarship aid of some kind and about 275 who did not play football received scholarship aid (R. 213).

We have heretofore pointed out that all scholarship aid is given through, and only through, a committee of the faculty. No boy receives any money, whether an athlete or not, but may receive board, tuition, room rent—all, or any one of them. This is true of students who do not play football as well as of students who do (R. 212 and 238). No inducement is offered to football players, except in some instances scholarships or loans, as stated above, just as are offered to other students.

The Southeastern Conference permits faculties to allow scholarship aid to athletes on the same basis as other students but not otherwise, following in this respect substantially the Cecil Rhodes Plan (R. 243, 244).

We summarize this aspect of the matter as follows: No athlete at either institution receives any inducement of any kind except such scholarship or loan aid as may be extended to him through the faculty committee administering funds for student aid. No part of these funds is limited to those students who are inter-collegiate athletes. It does not appear that those athletes who receive scholarships are in any larger percentage than other classes of students or that they get any benefit disproportionate to other students who also receive scholarship aid. All of this is wholly undisputed. There is not a word in the record indicating that these requirements are evaded in any way or that any subterfuge is resorted to. The finding of the Circuit Court of Appeals therefore that the Board of Regents is subject

to no possible criticism under the record in these respects is abundantly sustained.

In the Circuit Court of Appeals opposing counsel pressed the view that the whole athletic program could not be regarded as an educational activity because at the Georgia School of Technology no credit was given toward a degree for participation in any part of the program, and at the University of Georgia the credits that may thus be gained are very limited. If it is to be said that no activity at a State institution is to be regarded as truly educational unless credit is given toward a degree, then we would be forced to say that literary societies, class debates, inter-collegiate debates, art associations, student publications, dramatic clubs, religious welfare societies and the vast body of extra curricula activities are not educational. As a matter of fact, no one would seriously claim this. Able educators regard these extra curricula activities as a most important part of the education of the boys and girls. It is true that the Federal Government has not as yet attempted to tax any of these things and probably will not attempt to tax them, but the point is that if the position of opposing counsel is correct that failure to give credit toward graduation is the test, then all these other activities are non-educational and could be taxed. There is no special distinction as to football.

In the Circuit Court of Appeals it was also suggested that inter-collegiate athletics should not be regarded as a part of an educational program because physical training could be given adequately and less expensively by calisthenics and the like. The picture of education in a college world which is thus disclosed is one where the student studies hard in classes, takes calisthenics for his physical development, and confines his interests within these limits. Any modern educator would regard such a picture as medieval. Youthful interests never have been confined within

such bounds and never will be. Modern educators would say without hesitation that such confinement would be unfortunate if it could be accomplished. Life itself is the best educator. Hence, American colleges today try to control and direct the extra curricula life of the college community along lines of educational value. As hereinafter pointed out, the most important consideration here is the inculcation of those social attitudes which are most desirable in after life. This extra curricula training of the college community includes all of those activities which are stimulated and directed by the responsible authorities and directed toward educational ends. This training includes literary societies, debates, glee clubs, dramatic clubs, college publications, religious organizations, athletics and sports of all kinds, both inter-collegiate and intramural and many others. To appreciate the true value of college sports from an educational standpoint they must be considered as merely a part of an entire program, but none the less an integral and important part of high and recognized educational importance.

It should be noted finally on this point that the Board of Regents which, as heretofore pointed out, is a department of the State Government, has approved the entire program of physical education (R. 225), and that, as pointed out, the Act of 1935 is a clear approval of the same by the General Assembly of the State. The whole situation on the point can be summarized by saying that the evidence shows without dispute that the responsible governmental authorities of the State of Georgia are in fact and in good faith in each of these two institutions of the State of Georgia using inter-collegiate contests as an integral part of a program of education.

The cases in this country which have considered whether athletic contests held by State Governmental Institutions are themselves governmental functions have uniformly an-

swered the question in the affirmative. *Mokovich* v. *Independent School District of Virginia,* 225 N. W. 292 (Minn.), considered whether a school district could be sued for injuries received by a student in an interscholastic football game at which admissions were charged. It was held that such game was part of the program of public education; was a governmental function; and therefore, no liability existed.

The following cases have emphasized the fact that physical education, the maintenance of fields for athletic contests, and the like, are integral parts of an educational program:

German Gymnastic Ass'n v. *Louisville,* 117 Ky. 958; 80 S. W. 201;

from which the following is quoted:

> "Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiment. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to a perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the state as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. In *Mt. Herman Boys' School* v. *Gill,* 145 Mass. 146; 13 N. E. 354, the court said: 'Education may be particularly directed to either the mental, moral or physical

> powers and faculties, but in its broadest and best sense it relates to them all.' In *Huohs* v. *Backer,* 6 Heisk, 395; 19 Am. Rep. 398, the court said: 'In its broadest sense, the word "education" comprehends, not merely the instruction received at school or college, but the whole course of training, moral, intellectual and physical.' "

In the cited case the Court of Appeals of Kentucky held the Athletic Association involved to be exempt from taxation, being an educational institution.

Reiger v. *The Board of Education of Springfield,* 287 Ill. 590, 122 N. E. 838, at p. 839:

> "It could not very well be contended that a modern public school of the character described in the bill, in a city of the size of Springfield, ought not to have suitable playgrounds and athletic fields for pupils. Such a necessity is now generally recognized by all school authorities in order to obtain the best mental training and development."

The Supreme Court of Washington has ruled to the same effect: *State ex rel. School Dist. No. 56, Chelan County* v. *Superior Court of Chelan County et al.* (Sup. Ct. of Washington), 124 Pac. 484, 69 Wash. 189:

> "Since the physical development of a child attending school cannot be had without a suitable place for recreation and exercise, the condemnation of land adjacent to a school building for an athletic and play ground is a taking for public use. • • •
>
> "Finally, it is urged that the use for which the land is sought to be taken is not a public use. It is contended that the land is sought rather as a playground for the pupils attending the school than for strictly school purposes. The testimony of the superintendent of the school from which we have hereinbefore cited undoubtedly lends color to this contention, but nevertheless we think the use for which the land is sought to be taken is

a public use. The physical development of a child is as essential to his well-being as is his mental development, and physical development cannot be had without suitable places for recreation and exercise. To acquire such grounds is therefore within the province of the public schools."

Similarly, the Supreme Court of North Dakota has ruled: *Anderson* v. *Board of Education* (Sup. Ct. of North Dakota), 190 N.W. 807, at p. 809, 49 N.D. 181:

"Subdivision 4 of section 18 of the act confers upon the board of education power to purchase all the needful supplies for the schools and all apparatus, furniture, and appendages. This power is broad enough to authorize the board to purchase all needful supplies for use in maintaining the health of the pupils and for their proper physical development. It may provide for apparatus to be used in manual training which develops the intellect and skill of the pupil, and as well contributes to his physical improvement. *So likewise may apparatus be provided for track or football or basketball,* and for smaller pupils, swings, teeter boards, and such other apparatus may be provided, all designed to improve the pupil in some respect. All such apparatus and much more not necessary here to mention the board is authorized to provide for use in the schools. All such apparatus is considered approximately as much a part of the needful supplies of schools as are the desks or other needful furniture. It constitutes a necessary part and portion of the school system. The school would not be kept in needful supplies, unless such were a part of them. Hence, when the board of education provides them, it is acting in a purely governmental capacity. In reality it is a part of the principal duties of the board to provide such needful and necessary apparatus." (Italics ours.)

Likewise, in *Spencer* v. *School District No. 1,* 254 Pac. 357, 121 Ore. 511, the Supreme Court of Oregon held that the maintenance of a gymnasium for use of students was the

performance of an essential governmental function, for which the defendant was immune from an action for damages for negligence.

In the next division of this brief, we point out that the use of such contests as a part of the program of Education is approved by the best educational thought in this country. We believe that the opinions of educators of recognized authority are valuable for consideration by the Court at this point. Not that it is necessary for the Court to determine whether these educators are correct in their views. That determination as we will later point out, so far as it relates to the public institutions of the State of Georgia, is one to be made by the responsible authorities of that State. When, however, we assert that those State authorities have in good faith determined to use athletic contests as a part of a general educational program it is helpful in considering whether that determination is in good faith or is a mere pretense or subterfuge to know what educators, generally, think on this subject.

4.

Educators Regard Athletic Contests as Sound Part of Program of Physical Education.

Since the discussion of this subject, involving the current thought and expressions of leading educators, requires considerable quotations and excerpts from books and articles, we have set out this discussion in the appendix to this brief, to which the Court's attention is directed.

5.

The Means by Which the State Carries Out its Program of Education are for Determination of State Authorities, Not Subject to Review by Federal Government.

The above proposition we believe to be controlling in the present case. We have seen that the State of Georgia is in

fact using these intercollegiate sports as an integral part of its program of public education. We have pointed out that there is no possibility of saying that such use either originated as a commercial venture or is used as a mere commercial venture. There is no basis for claiming that the action of the State authorities in using such contests in its program of education is a mere pretense or subterfuge. We have seen, furthermore, that the view reached by the State of Georgia through its responsible authorities as to the suitability of such athletic contests in a program of physical education is in accord with the views of a large majority of students of education in this country.

We therefore say: *The determination of the State authorities to include these contests in the State's program of education is in all respects binding on the Federal Government.* They must be treated as a part of the State's program of public education.

The foregoing inevitably results from the relation between the Federal Government and the State Governments under our constitutional structure. "So long as our present dual form of Government endures, the States, it must never be forgotten, are as independent of the general Government as that Government within its sphere is independent of the States." *Bush* v. *Commissioner Internal Revenue,* 300 U. S. 352, 364, citing *Collector* v. *Day,* 11 Wall. 113; *Texas* v. *White,* 7 Wall. 700.

It is not too much to say that the proposition reaches the very core of our constitutional structure; nor is it too much to say that it is controlling on the merits of this case.

In *U. S.* v. *Baltimore & Ohio Railroad Company,* 17 Wall. 322, this situation was presented: The City of Baltimore had loaned money to the Baltimore & Ohio Railroad Company to encourage the construction of the railroad. The Federal Government undertook to enforce a liability upon the B. &

O. Railroad to withhold at the source a Federal tax on the interest on the bonds of the railroad which had been issued to the City for the money thus loaned. Among other contentions made by the Federal Government was that the City had gone into a mere commercial venture and, therefore, since the loan was not made in the performance of a governmental function, it was subject to taxation. With regard to it the court says:

> "This was a question for the decision of the city under the authority of the state. It was a question to be decided solely with reference to public and municipal interests. The city had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The state could do these things by the direct act of its legislature, or it could empower the city to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the city. It might be wise, or it might prove otherwise. * * * The city had the power given it by the legislature to decide the question. It was within the scope of its municipal powers."

Smith v. *Kansas City Title & Trust Company*, 255 U. S. 180, is here a case of great importance. It was a suit in equity questioning the constitutionality of the bonds issued by a Federal Land Bank upon the ground that the Federal Government had exceeded its constitutional powers in instituting such land banks. It was alleged that they were mere commercial ventures and that the claim that the Government has established them as fiscal agencies of government was a mere pretense. The suit set out a strong showing as to the extent to which such land banks were engaged in general financial business and the attenuated connection they had with any fiscal purposes of the Federal Government. The court, however, declined to consider this attack

on the ground that Congress having power to establish fiscal agencies of government its determination of the means that were used in carrying out this function could not be questioned. The application here is clear: The State, having the power to carry out a program of public education, the means adopted by State authorities to this end likewise can not be questioned. We quote from the decision as follows:

> "But, it is urged, the attempt to create these federal agencies, and to make these banks agents and public depositaries of the government, is but a pretext. But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *McCray* v. *United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 147, 153, 156, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 and cases cited."

In the *State of Arizona* v. *The State of California*, 283 U. S. 423, Arizona attempted to question the authority of the Federal Government to construct Boulder Dam, the basis of the attack being that the only asserted power for the construction was that of the Federal Government over navigable streams and that in point of fact it was a mere pretense that the construction was for navigation, it being alleged that the construction was for wholly other purposes not within the power of the Federal Government. The case is in point, though it did not involve State action, because as heretofore pointed out the States within their respective spheres are equally independent. In reference to this attack the court says:

> "The bill further alleges that the recital in said act that the purpose thereof is the improvement of navigation * * * is a mere subterfuge and false pretense.

It quotes a passage in article IV of the compact, to which the act is subject, which declares that: 'Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes;' and alleges that 'even if said river were navigable, the diversion, sale and delivery of water therefrom, as authorized in said act, would not improve but would destroy, its navigable capacity.'

"Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not inquire. *McCray* v. *United States,* 195 U. S. 27, 53-59, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Weber* v. *Freed,* 239 U. S. 325, 329, 330, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317; *Wilson* v. *New,* 243 U. S. 332, 358, 359, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *United States* v. *Doremus,* 249 U. S. 86, 93, 94, 39 S. Ct. 214, 63 L. Ed. 493; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 187, 39 S. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161, 40 S. Ct. 106, 64 L. Ed. 194; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, 210, 41 S. Ct. 243, 65 L. Ed. 577. The act declares that the authority to construct the dam and reservoir is conferred, among other things, for the purpose of 'improving navigation and regulating the flow of the Colorado River.' As the river is navigable and the means which the act provides are not unrelated to the control of navigation, *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 419, 46 S. Ct. 144, 70 L. Ed. 339, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this court to determine."

In substance the same principle is briefly stated by the court in sustaining the Tennessee Valley Authority. *Ash-*

wander v. *Tennessee Valley Authority*, 297 U. S. 288. *See page 329.*

It is wholly inconsistent with the independence of a government within its own sphere to permit another government to question the determination of the means by which governmental programs are carried out. Within their respective spheres the states are treated as independent governments in this respect. If in the enforcement of its tax laws the Federal Government can question the selection of the means by which the states perform their governmental functions, then it would follow that the State governments in the enforcement of their tax laws could likewise question means by which the Federal Government carried out its governmental functions. It is fundamental here that the rights are reciprocal.

Any contrary rule would permit a State in an effort to tax national banks to force an inquiry as to whether they were really enterprises for private gain and not in reality used as fiscal agencies of the Government.

It would likewise permit a state, seeking to tax the Reconstruction Finance Corporation, to raise questions as to its commercial activities similar to those the court refused to permit raised as to the Federal Land Banks. Illustrations could be given as to many other corporations used as agencies of the Federal Government.

Of course the court would not permit a State to do anything of the kind. It should not be permitted. Any such action questioning the decision of the Federal Government as to the means it shall use in carrying out its governmental functions would be wholly inconsistent with the governmental powers it possesses in its constitutional sphere. It is clear that the means used by the State of Georgia in carrying out its program of public education are just as completely for the determination of the State authorities

alone and their decision, unless a mere pretext or subterfuge, must be taken as final.

It is equally true that only in the gravest and clearest cases would this Court hold that the action of responsible State authorities within the scope of their powers was a mere pretext or subterfuge. Ordinary rules of comity would require that every presumption of good faith should be indulged. For reasons indicated in another sub-division of the brief there is no possibility of questioning in this case the conclusion of the Circuit Court of Appeals that the State of Georgia through its authorized officials has in fact and in good faith adopted contests of this kind as an integral part of its program of public education.

6.

State Activity Does Not Cease to be Governmental Because it Produces Some Revenue.

This proposition can be disposed of briefly. It is not necessary to do more than to cite the decisions of this court:

People of State of New York v. *Graves,* 299 U. S. 401;
Bush v. *Commissioner,* 300 U. S. 352.

Other citations could be given but these are controlling.

The last case dealt with an effort to tax the salary of the chief engineer of the Bureau of Water Supply of New York. It was held that the tax could not be collected. Among other things, the court says:

> "If that service be governmental it does not become private because a charge is made for it or a profit realized."

As an illustration of this, the court refers to the function of public education, saying:

> "The state or the city may exact a tuition charge for instruction in the public schools; but thereby the

maintenance of the public schools does not cease to be a function of the government."

7.

The Tax is Directly on a State Activity and Directly Burdens that Activity. The Burden of Collecting the Tax is on the State Agency.

While the purchaser of the ticket is the taxpayer, nevertheless, the tax is imposed directly and immediately on the transaction conducted by the State, namely, the sale of the ticket or license to attend the athletic contest.

Late cases from this Court have reviewed fully the realm of law here applicable. They have restricted the extent to which private interests may claim an immunity from taxation because the transactions involved were to some extent connected with a State activity. In the immediate case, it is not a private interest but the State itself that is claiming the immunity; and what is even more controlling, the tax here involved is levied directly upon the State activity itself.

Throughout the entire line of decisions from this Court on this subject, including the latest expressions from the court, it has been uniformly declared that where the tax levy is directly on a State transaction it must be treated as burdening that transaction and hence invalid.

Osborn v. *Bank of the United States,* 9 Wheat. 738, involved a State privilege tax on the Bank of the United States which was held to be invalid. The details are not here material. The court says that the tax has the same effect as a tax on a contract of a governmental agency executed in performing a function of the government. And with regard to that the court adds:

> "We do not admit that the act of purchasing or conveying the articles purchased can be under State control."

In *Weston* v. *Charleston*, 2 Pet. 449, the court dealt with a city ordinance imposing a tax on all stock issued by the United States in retirement of its debts, which was held unconstitutional. We quote as follows:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

In *Ambrosini* v. *United States*, 187 U. S. 1, the defendant had been convicted of a failure to affix stamps to a bond given by him to the State of Illinois as a condition for the issuance of a liquor license by the State. The conviction was reversed; the court holding that the bond was an essential part of the transaction in which the State granted the license and that the Federal Government could not impose a tax thereon. We quote as follows:

> "The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. Nelson, J., *The Collector* v. *Day*, 11 Wall. 113, *sub nom. Buffington* v. *Day*, 20 L. Ed. 122."

Here the tax, though levied on the purchaser, is immediately on the State license to attend the contest.

In *Wheeler Lumber Bridge and Supply Co.* v. *United States*, 281 U. S. 572, the court sustained a Federal tax

of three per cent of the amount paid for the transportation of freight on a shipment of lumber sold to a county. The basis of the holding, however, is that the transportation of the lumber was a different matter from the sale itself. The distinction made by the court indicates clearly that a tax directly on the sale by the county could not have been sustained; the Court pointing out that the tax was "not laid on the sale nor because of the sale."

In *Alward* v. *Johnson,* 282 U. S. 509, the Court sustained an ad valorem tax on property used in carrying the mails, but again drew the distinction between such a tax and a levy directly on the government taxation itself, pointing out that had the tax been levied on the contract of carriage it could not have been sustained. The Court says:

> "There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely."

Indian Motor Cycle Co. v. *United States,* 283 U. S. 570, involved an excise tax on the sale of motorcycles to a State governmental agency. The Court holds that the sale and purchase is a single transaction in which the purchaser is an essential participant. Without his participation there could be no sale. Hence the tax was held to be laid directly on a contract by the State, and even though assessed against the other party to the contract was invalid.

For similar reasons, the Court in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, held invalid an excise tax by the State of Mississippi as applied to gasoline sold to the United States Government, even though the tax was assessed against the seller.

Graves v. *Texas Co.,* 298 U. S. 393, was the case of an injunction against the collection of a State tax on the withdrawal from storage of gasoline sold the United States.

The Court held the withdrawal from storage to be an integral part of the sale and hence the tax could not be collected. The Court says:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons."

In *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383, the Court sustained a tax on the manufacture of tobacco sold the State of Massachusetts, but again points out that had the tax been levied directly upon the sale to the State of Massachusetts it would have been a tax upon a State transaction and invalid.

James v. *Dravo Contracting Co.*, 302 U. S. 134, dealt with a claim of an independent contractor that a gross income tax could not be levied by a State on income derived from a government contract. The claim was denied by a majority of the Court; but throughout the exhaustive review of prior decisions the Court maintains always the distinction between such a gross income tax on the one hand, and on the other a direct excise levy on the government contract itself. The Court points out that in the case before it *"the tax is not laid upon the contract of the Government"*. Earnings of the contractor follow from his work, not from his contract. The Government has no further concern with the contract after the execution of the contract. What the contractor makes is of no consequence to the Government "so long as his contract and its execution are not interfered with". "The contract is the means employed for carrying into execution the powers of the Government, *and the contract alone*, and not the contractor, is exempt from taxation or other interference by the State Government."

Helvering v. *Mountain Producers Corp.*, decided March 7, 1938, 82 Adv. Op. 607, 58 Sup. Ct. 623, is the latest expression from this Court. It again sustains the distinction here pressed. The claim of a lessee of State oil lands that income made from the leased lands was immune from taxation was denied; the Court overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado, Oil & Gas Co.*, 285 U. S. 393. In sustaining the tax, however, the Court specifically points out that "the tax is not laid upon the leases as such". The Court also points out that it is dealing with a claim of immunity "sought by a private person for his property or his gains".

From the foregoing review of decisions in this Court it is clear that the Court has consistently maintained the position that a State itself may claim immunity from Federal taxation levied directly and immediately on State contracts or transactions exercised in a government function. Nothing in the later cases impairs in any way this proposition. On the contrary, each of the later cases emphasize the existence of such immunity. The application of the proposition here is perfectly plain. The State itself is claiming the immunity, and the tax levied is immediately upon the contract or license issued by the State with respect to which the tax is levied. It is believed there is no authority for sustaining a tax under these circumstances.

Furthermore, viewed from a practical economic standpoint, the record now before the Court shows clearly that the impact of this tax is directly against State funds. The tickets issued by the two State institutions bore upon their face a purported division of the amount collected between admission and tax, this being required in order to avoid possible criminal liability, but the ticket itself stated that the institution denied its liability for such tax and that the whole amount was intended to be the price of admission unless the State agency failed to sustain its position that a tax

could not be legitimately collected. Three of these tickets are shown in the record, and the figures there given make it perfectly plain that if the tax is enforced it will, from an economic standpoint, fall directly on State funds. On page 289 of the Record is shown one of the tickets. The amount collected from the purchaser under the ticket was $1.50. It is divided, $1.36 admission and .14 tax. On page 345 is shown another ticket where the price was the same and the division was the same.

On page 344 is shown a third ticket. The total amount collected under that ticket was $2.25. Its division is $2.04 admission and .21 tax.

It is entirely obvious that these transactions actually represent sales of tickets at $1.50 and $2.25, respectively. It can not be rationally supposed that had there been no claim of taxation two of the tickets would have sold for $1.36 and the other would have sold for $2.04. Common sense repudiates any such idea just as it was repudiated by the Circuit Court of Appeals (R. 433).

Finally, the levy is further void because it seeks to impose a liability upon a State agency as a collecting agency for the Federal government.

The decision of the Supreme Court of the United States in *Kentucky* v. *Dennison,* 24 How. 66, is here in point. It dealt with an act of Congress requiring the return of fugitives and provided that "it shall be the duty of the executive" of the State to cause the arrest and delivery of the fugitive. The Court says:

> "• • • Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if

it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.

"It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing that in using this word 'duty' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution."

PART TWO.

Procedural Questions.

The application for writ of certiorari raises three procedural questions. They relate:

First, that respondent has no standing to contest the validity of the penalty assessed herein;

Second, the contention that R. S. 3224 prevents the maintenance of a suit for injunction; and,

Third, the contention that the Collector originally sued, Mr. W. E. Page, having resigned while this case was pending in the Circuit Court of Appeals, the case thereupon became moot and the Court erred in permitting his successor to be substituted as a party.

We will consider these specifications in the order indicated:

1.

We contend that the facts in this record show that the respondent has collected no taxes for the Federal Government. We further contend that if its conduct can, by any

stretch of the imagination, be considered acting as agent for the Federal Government, it, as pointed out by the Circuit Court of Appeals, "did so under coercion brought about by the fear of being mistaken in its expressed opinion that it could not be required to collect taxes for the Federal Government and that no taxes were due." The facts are these:

The officials of the State of Georgia, having charge of its institutions of higher education, reached the definite conclusion that the Federal Amusements Taxes could not be constitutionally applied to the admissions to athletic contests held by these institutions. This conclusion is sustained, we believe, by the discussion in the first part of this brief. The fact that it has been sustained by both of the lower courts indicates, to say the least, that it is a view that may reasonably be held. In such a situation it was obviously the duty of the State officials to raise this constitutional question in an orderly and legal manner for determination by the appropriate courts.

As is hereinafter discussed in detail, respondent endeavored to raise the question for a prior period by collecting the admissions tax and paying it to the Treasury Department and filing claim for refund. Whereupon, the Treasury Department ruled that one who had collected a tax imposed on another could not proceed by claim for refund.

The State Officials then recognized the rule that one who voluntarily collects taxes for the Federal Government and who as a result thereof has in his hands funds in which he has no interest but which were collected for the Federal Government could not simply appropriate these funds or refuse to pay them over. They necessarily recognized also that if they voluntarily collected funds as taxes and paid them over to the Government they would be in the same position and they would have no standing for their recovery.

On the other hand they were faced with the fact that the Federal Statutes, if applicable to State institutions, carried with them grave criminal liability if the statutes were entirely disregarded. U. S. C. A. Title 26, Section 958 (b) (44 Stat. 116), provides that any person required to collect the tax involved who wilfully endeavors to defeat the tax or the payment thereof shall in addition to other penalties be guilty of a felony and fined not more than Ten Thousand ($10,000.00) Dollars or imprisoned for not more than five years, or both.

U. S. C. A., Title 26, Section 942 (44 Stat. 92), provides that "the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold, shall be conspicuously and indelibly printed, stamped or written on the face or the back" of the ticket. A violation of this requirement is a misdemeanor.

Treasury Regulations issued pursuant to these statutes (Regulations 42, Article 29) require that "the established price" and the "tax paid" shall be separately stated on the ticket. To have entirely ignored these provisions would have exposed the agents of respondent to grave criminal liability had it ultimately proved that respondent's position as to the constitutional questions involved could not be sustained.

One of the fundamental grounds for permitting a resort to equity to question the validity or application of statutory requirements is that such statutes carry with them grave criminal penalties to which a party in good faith seeking to raise the question of the validity or application of the statutes ought not to be exposed as a condition of contesting the matter. See, for example:

Ex parte Young, 209 U. S. 123;
Oklahoma Operating Co. v. *Love*, 252 U. S. 335;
Sou. Bell Tel. & Tel. Co. v. *Calhoun*, 287 Fed. 383.

This principle is, we believe, applicable with special force to State Officials in the position of the governing authorities of respondent in this case. The plan adopted was to put on the face of the ticket a statement dividing the amount collected into an "established price" and "tax" but to add upon each ticket a statement explaining the position of respondent in the following language:

> "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is *itself* liable for the tax." (Italics ours.) (R. 345.)

The same notice, except for the name, School of Technology, appeared upon each ticket sold by the School of Technology (R. 191, 200, 290). This action was taken solely to protect the personnel of respondent from criminal prosecution (R. 196). The meaning of the language, we believe, is perfectly plain. It says without equivocation that respondent denies that any tax is due and that it is not undertaking to collect any tax; that the division stated on the front of the ticket is merely a formal requirement to comply with Treasury Regulations; but that respondent claimed and intended to retain the whole amount as the price of admission, except in one contingency only, namely: "Unless it is finally determined that the University is *itself* liable for the tax."

The Circuit Court of Appeals has in an unanswerable statement destroyed the contention that this conduct of respondent amounted to such voluntary collection of a tax for

the Federal Government as to bar it from relief. We quote from 81 F. (2d) 580, as follows:

> "The conduct of law-abiding citizens, relying upon constitutional rights but at the same time giving respectful though unwilling obedience to an Act of Congress believed to be inapplicable or unconstitutional, should not be distorted into a voluntary assent to the very application of the statute which is being protested against and emphatically challenged."

Judge Hutchinson dissented from other positions taken by the Court but expressed no disagreement with this proposition.

The Court further says:

> "The only other recourse, except the one followed by appellant, was to disregard the law as construed by administrative officers, and to fail or refuse to comply with it and regulations promulgated thereunder by the Commissioner of Internal Revenue. This would have involved financial hazards and risks of criminal prosecutions which no prudent, law-abiding citizen should be required to incur."

And further:

> "The course taken by appellant seems to us most appropriate. The money was collected by the respective athletic departments under an agreement with the purchasers that, if no tax was due by the University or School of Technology, the amounts so collected should be added to the price of admission and retained by the appellant. There was nothing unfair or illegal about such an agreement. It was one of which the United States could not reasonably complain. If the tax was due by appellant or it was legally required to collect the same, it is the duty of the collecting agent to pay it over; if the admissions were immune from federal taxation, there was no valid agency and certainly no obligation to pay anything over to the appellee. We find noth-

ing in the conduct of the Board of Regents to estop it from standing upon its constitutional rights and asserting the invalidity or inapplicability of the alleged tax."

2.

R. S. 3224 Does Not Prevent Equitable Relief.

It is definitely settled that R. S. 3224 (U. S. C. A., Title 26, Section 154) is merely declaratory of the prior rule that courts will not entertain a suit to restrain the collection of a tax upon the sole ground of its invalidity or the unconstitutionality of the tax statutes. The rule is not, however, absolute and has no application in exceptional and extraordinary cases where there is an absence of a plain, adequate and complete remedy at law. It is not necessary to elaborate this statement. We need only refer to the following:

Miller v. *Standard Nut Margarine Co.*, 284 U. S. 498;
Hill v. *Wallace*, 259 U. S. 44;
Brushaber v. *U. P. Ry.*, 240 U. S. 1;
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 442;
Rickert Rice Mills v. *Fontenot*, 297 U. S. 110;
Wilson v. *Ill. Sou. Ry. Co.*, 263 U. S. 574.

All cases in which relief has been denied will, upon examination, be found to be instances in which no showing was made that there was no adequate remedy available except on the equity side of the court. The inquiry therefore in any case is whether the party contesting the tax could obtain reasonably adequate protection in raising the contention otherwise than by resorting to equity. If so, injunctive relief is barred; if not, equity will take jurisdiction.

In the present case there are the following exceptional and extraordinary circumstances which make a resort to equity proper, namely:

(a) The effort here is to impose a penalty on a sovereign State and to seize funds belonging to the State;

(b) The assessments here were not against respondent but were levied on funds held by respondent for the State of Georgia. Hence, if respondent had paid the assessments it would have had no standing to seek a refund.

(c) R.S. 3224 does not apply where penalties, as distinguished from taxes, are involved

(d) Respondent could not have sought a remedy by collecting a tax, paying it over to the Government and seeking a refund because in that event its acquiescence in acting as a collecting agency would have barred its rights.

(e) Further, respondent could not have attempted that procedure by paying from its own funds the equivalent of the tax because the tax is not laid against it but against the patrons. Only a taxpayer can sue for refund.

(f) Even if respondent could have secured a return of funds in this way, it would not thereby have been accorded an adequate remedy because it would have imposed on it the burden of acting as a Federal collecting agency, which burden cannot be imposed upon a State without its assent.

(g) Also, such procedure would not accord an adequate remedy even if it could be followed because it would impose upon respondent an obligation to collect from patrons alleged taxes not in fact due the Federal Government. State officials should be relieved of such inequitable requirements.

(h) The State is entitled to a remedy by injunction which will relieve its funds from liens and relieve it of a multiplicity of suits.

A discussion of the circumstances above enumerated will be taken up in the order shown.

A. Effort Here Is to Impose a Penalty on Sovereign State and to Seize Funds Belonging to It

That the effort to collect a penalty from a sovereign state is such an exceptional and extraordinary circumstance as justifies a proceeding in equity to determine the validity of the tax as applied to the State is shown by the decisions of this court in *Ohio* v. *Helvering,* 292 U. S. 360, and *Florida* v. *Mellon,* 273 U. S. 12. In the former, the State of Ohio brought a motion in this Court for leave to file a Bill of Complaint against the Commissioner of Internal Revenue and several Collectors of Internal Revenue, the State seeking to enjoin the enforcement against it of a Federal tax Statute. The Bill alleged, as stated by the court, "that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign State; and it, therefore, is contended that the equity power of the court is properly invoked. * * *"

This Court, speaking through Mr. Justice Sutherland, and necessarily upholding the contention that the circumstances were exceptional, proceeded at once to the fundamental question involved, saying: "Putting aside various preliminary questions raised by defendants * * * we pass at once to the fundamental question involved in the State's challenge to the validity of the tax."

While the court reached the conclusion that the State was not immune from the tax involved, it nevertheless placed its

efusal to grant the motion by ruling on the merits of the uestion and thereby approved the procedure by injunction.

Likewise, in *Florida* v. *Mellon, supra,* the State of Florida y motion sought to file a bill in this Court to enjoin the ecretary of the Treasury and the Commissioner of Internal evenue from attempting to collect Federal Inheritance axes in Florida. The official report of the case shows that lthough Section 3224 of the Revised Statutes was urged s a bar to the proceeding, this Court ignored the suggestion nd proceeded to uphold the constitutionality of the Estate ax Act as a basis for denying leave to file the Bill.

Following the decision in *Ohio* v. *Helvering* is the case of ennsylvania v. *Fix, Collector,* 7 Fed. Sup. 729. This, also, as a suit by a State, Pennsylvania, against the Collector of nternal Revenue to restrain the collection of the alcohol ax in connection with the operation by the state of a number f retail liquor stores. The Collector contended that the ction was prohibited by Revised Statutes 3224. The Dis-ict Court, however, held:

> "The plaintiff contends that Section 3224, R.S., * * * forbidding suits to restrain the collection of a tax applies to this case, and that this court is without jurisdiction. This is deserving of some discussion. * * *
>
> "It has been held by the Supreme Court of the United States that Section 3224, R.S., does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provision inapplicable. * * *
>
> *"The circumstances of this case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign state."* (Italics ours.)

The above rulings are directly applicable to the present tuation.

B. Assessments Here Not Against Respondent, But Warrants for Distraint Levied on Funds Held by Respondent for State of Georgia. Hence, if Respondent Had Paid Assessments it Would Have no Standing to Seek a Refund.

The joint assessments here involved were made against the following:

Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control of Georgia Tech Athletic Association, Dr. M. L. Brittain, Dr. W. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, George W. McCarty, Robert T. Jones, Jr., Jack Phillips, D. Kalkhurst, W. N. Glenn, together with University of Georgia Department of Athletics, Charles E. Martin, Trustee, and University of Georgia Athletic Association (R. 349-350).

Levies by the Collector, under such assessments, were made on accounts, respectively, in the First National Bank of Atlanta and the Citizens & Southern National Bank of Athens (R. 365, 375). These accounts, though carried for convenience in the names of "Charles Martin, Trustee," and "Georgia Tech Athletic Association," were the property of respondent (R. 156, 381, 382).

In explanation of this assertion, the account in the name of "Charles E. Martin, as Trustee," which was levied upon, was held by him as Trustee for the Regents of the University System of Georgia (R. 195), Martin being an employee of the Department of Athletics of the University of Georgia at Athens (R. 191). The account in the name of "Georgia Tech Athletic Association Tax Account" (R. 375, 376), was also the property of the Regents, this Association being a mere unincorporated department of the School of Technology (R. 224, 225, 201, 219).

In further explanation of this assertion, it has been noted in Part One of this brief (*supra,* p. 8) that under the Act of the Georgia Legislature in 1931 creating the Regents of the University System of Georgia, it was provided that all moneys coming into the hands of the Board from any source shall be held and used for the particular institution, and that the Act of 1935, defining the status of the Regents, declared all proceeds of athletic contests to be under the control of respondent, whether exercised directly or through athletic associations or departments.

R. S. 3224 is, moreover, applicable only in cases where the Collector is seeking to collect the tax against the person against whom the primary tax liability exists or against whom the assessment is made. It has no application where, as in the present case, the appellant is not the "taxpayer"—person against whom the assessment was made.

> "Section 3224, R. S. * * * that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,' *applies to taxpayers only,* and who, thus deprived of one remedy, are given another by * * * action to recover after taxes paid and repayment denied by the Commissioner. * * * The revenue laws are a code or system in regulation of tax assessment and collection. *They relate to taxpayers, and not to nontaxpayers.* The latter are without their scope. *No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies in due course of law.* With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws. *The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff, and against whom no assessment has been made, and of whom no collection is sought.* * * * *This presents a widely different case than that wherein the person assessed, or whose property is assessed, seeks to restrain assessment or collec-*

tion * * *." (Italics ours.) *Long* v. *Rasmussen*, 281 Fed. 236.

An injunction was accordingly granted in the cited case. In *Hubbard Investment Company* v. *Brast*, 59 F. (2d) 709 (4 C. C. A.), the court said of Revised Statutes 3224:

> "It has no application to a suit instituted, not to restrain the assessment or collection of a tax, but the sale of property which does not belong to the taxpayer and is not subject to distraint and sale for taxes assessed against him. * * * If, therefore, this were a case where property equitably belonging to one person were being sold in satisfaction of taxes assessed against another, the statute relied upon would afford no reason for refusing relief."

The same ruling was made in the case of *Trinacia Real Estate Co.* v. *Clarke*, 34 F. (2d) 325, as follows:

> "Section 3224, R. S., does not prevent the granting of an injunction against a sale under distraint proceedings of property owned by a person other than a taxpayer."

To the same effect are:

Livingston v. *Becker*, 40 F. (2d) 673, and
Lion Coal Co. v. *Anderson, Collector*, 62 F. (2d) 325, 328.

The reason why an injunction is proper under such circumstances is found in the law and the rulings that the person against whom the assessment is made is given another remedy in lieu of injunction proceedings, namely: by claim for refund. The taxpayer is the only person who by claim for refund can contest the legality of the tax after paying the same, and the only way in which any other person can proceed is by injunction.

The ruling of the courts referred to, holding that it is the right of a *taxpayer* only to proceed by claim for refund, is typified by the decision in the case of *Shannopin Country Club* v. *Heiner,* 2 F. (2d) 293, involving an action by a club to recover admission dues collected by it from its members and paid over to the Treasury Department:

> "The revenue laws of the United States, under which this tax was assessed and collected by the plaintiff, impose this tax upon the members, and not upon the club itself. * * * Under this law, there is no primary money liability upon plaintiff to pay this tax. It had no burden other than acting as collecting agent for the government in collecting the amount of taxes imposed * * *. The plaintiff itself has paid no part of the taxes which it is now seeking to recover, and if it were permitted to recover judgment in this action, it would not in our opinion bar another action by the members themselves, who are the real parties in interest. If the taxes involved in the plaintiff's statement of claim were illegally assessed and collected from the members of the plaintiff corporation, they are the parties injured, and are the ones entitled to recover."

The same conclusion was reached in the case of *U. P. Ry.* v. *Bowers,* 33 F. (2d) 102 (2 C. C. A.), where the Railroad Company had, pursuant to provisions in its bonds, deducted a tax from the interest payable and paid such tax to the Treasury Department. Thereupon, it filed a claim for refund, and subsequently a suit to recover the tax. In denying the refund, on the ground that the Company was not the "taxpayer", the court said:

> "Subdivision (c) requires a return of the amount so withheld and makes the corporation 'liable for such tax;' * * * But in no event can the obligor be regarded as 'the taxpayer,' though he is 'liable for such tax.'"

This rule is concisely stated in *LaFayette Worsted Company* v. *Page*, 6 F. (2d) 399, 400, as follows:

> "The *person assessed* must pay it and bring his action in the courts to recover it back." (Italics ours.)

The same ruling was made in *Wourhack* v. *Becker*, 55 F. (2d) 840, certiorari denied 286 U. S. 548 (52 S. Ct. 501), where the former president of a corporation paid taxes assessed against the corporation and sued to recover same, the Eighth Circuit Court of Appeals ruling that he could not recover, not being the "taxpayer" assessed, but having voluntarily paid a tax which the law would not have compelled him to pay, had he contested the same before payment.

From these decisions it clearly appears that the only person who can, after paying an amount *as a tax*, thereafter by claim for refund and suit contest the legality of the collection of the amount paid by him is the person against whom the tax is assessed, namely, the taxpayer. Any person, other than the person primarily liable for the tax, who pays the tax due from another is considered as making a voluntary payment and cannot thereafter contest or have adjudicated the question whether or not the amount paid to cover the third person's tax liability was legal or proper.

In cases such as *Alliance Country Club* v. *U. S.*, 62 Ct. Claims 579; *Congressional Country Club* v. *U. S.*, 44 F. (2d) 266; *Masonic Country Club* v. *Holden*, 18 F. (2d) 553, which were actions to recover tax on dues, no issue was raised as to the propriety of the procedure.

In *Bunker Hill Country Club* v. *U. S.*, 9 Fed. (Supp.) 52, where the club had collected the tax the Court of Claims held that "the dues and initiation fees in question were

taxable and that as plaintiff collected them it was liable for the tax."

The case of *Builders Club of Chicago* v. *U. S.*, 14 Fed. Supp. 1020 (Court of Claims), is the only case in which a different conclusion has been reached. There the Court of Claims sustained the propriety of the remedy by a club by way of suit for recovery of taxes on dues collected by it, although the Treasury Department in that case contended that the procedure was improper and that, not being the taxpayer, procedure by claim for refund was not open to the club.

The only question in respect to this circumstance, therefore, is whether or not any *"tax"* is due by respondent. Is respondent the "taxpayer" against whom the alleged assessment was made? The answer to this, of course, is the assessment itself which is against the persons above mentioned (*supra*, p. 46).

Respondent does not claim that the point herein made as to the propriety of the procedure adopted by it relieves it from sustaining its position on the merits. While, of course, respondent's funds ought not to be seized under assessments issued against others, nevertheless if respondent was, by reason of its refusal to collect the tax, obligated to pay to the collector a penalty in the exact equivalent amount, it would have no equitable standing in court. Hence, we concede that the immediate point as to procedure nevertheless leaves on us the burden of sustaining our position on the merits. Thus, in *U. P. Ry.* v. *Bowers*, *supra*, dealing with the withholding provisions of the Revenue Act of 1931, the Second Circuit, although ruling that the Obligor of the bonds was not the taxpayer, the court said: "It made the obligor 'liable for such tax' only because of his promise to the Obligee * * *. The government could have enforced that promise at common law or in equity * * *."

C. R. S. 3224, Does Not Apply Where Penalties Are Involved.

The assessment above referred to was, moreover, for a penalty, punitive in nature, under the provisions of Section 1114 (d) of the Revenue Act of 1926, which provides:

> "Any person who wilfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by Titles IV, V, VI, VII, VIII, and IX, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be *liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over,* to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of Section 3176 of the Revised Statutes, as amended. * * * (Title 26, U. S. C. A. Sec. 958 (c). (Italics ours.)

This is demonstrated by the following. As observed by the Circuit Court of Appeals in its ruling on the motion to dismiss in this case, the return "in this case by the Commissioner was evidently made under Section 3176 of Revised Statutes as amended by Section 619 (d) of the Revenue Act of 1928." 81 F. (2d) 581. This provision of the Revised Statutes authorizes the Collector, in the event a person fails to make a return required by law, to "make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise." This section likewise provides that "The Commissioner of Internal Revenue shall determine and assess all taxes * * * as to which returns or lists are so made under the provisions of this section." As elsewhere stated, the Deputy Collector actually made returns (R. 352 thru 356).

Now, what was it that was returned by the Deputy Collector as aforesaid? The admission tax is imposed upon the purchaser of the ticket:

> "There shall be levied, assessed, collected and paid —a tax of 1 cent for each 10 cents * * * to be paid by the person paying for such admission." Section 500 (a), Revenue Act of 1926, as amended by Section 411 (a) of Revenue Act of 1928 and by Section 711 (a) of Revenue Act of 1932. (Title 26, U. S. C. A., Sec. 940.)

Certainly the return was not being made for purchasers of tickets of admission.

Section 502 of the said Act requires that:

> "Every person receiving any payments for such admission * * * shall collect the amount of the tax * * * from the person making such payments." (Title 26, U. S. C. A., Sec. 955 (a).)

It also provides that:

> "Such persons shall make returns under oath, in duplicate, and pay the taxes so collected to the Collector of the District in which the principal office or place of business is located." (Title 26, U. S. C. A., 956.)

Thus it is seen that the tax is imposed on the patron. If, however, the person required by law to collect the tax refuses or fails to collect the tax, thereupon such person becomes subject to a penalty in the amount of the tax which he has refused to collect.

Section 1114 of the Revenue Act of 1926 which provides for fines and imprisonment for failure or refusal to collect or pay over the admission tax, imposes an additional penalty in Sub-paragraph (d) thereof in the amount of the tax which has not been collected.

While the assessment here does not show the nature of the exaction, it must be assumed that it was under the provisions of Section 1114 (d), as that is the only provision under which an assessment can be made for failure to collect or pay the admission tax. Thus, it was this penalty which is represented in the assessment made by the Commissioner of Internal Revenue.

That the amount so assessed is a penalty seems clear enough from reading of the Statute itself as it is imposed on those who refuse to collect. Likewise, in the Admission Tax Regulations (No. 43) of the Treasury Department, Chapter Ten thereof, dealing with penalties, lists this section along with other penalties.

In this connection, of course, penalties can not be collected by distraint, even from the person assessed. *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. Nor can penalties which have been paid be recovered through claim for refund and suit. *Fontenot* v. *Accardo,* 278 Fed. 871 (C. C. A. 5th).

In the case of *Lipke* v. *Lederer, supra,* this Court makes the following observations in dealing with the provisions of the Prohibition Act:

> "The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide for the support of the Government,' the function of a penalty clearly involves the 'idea of punishment for infraction of the law,' and that a condition of its imposition is notice and hearing. * * * And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity.' "

Certain it is that if penalties can not be collected from the person against whom assessed, it must necessarily follow that they can not be collected by distraint from others against whom the assessments were not made.

D. Respondent Could Not Have Sought Remedy by Collecting Tax, Paying it Over to Government and Seeking Refund Because in That Event its Acquiescence in Acting as Collecting Agency Would Have Barred its Rights.

In considering this circumstance it is necessary to refer to the history of the controversy between respondent and the Federal Government with respect to admissions taxes.

Prior to the institution of this suit and for a period (in 1932) not here involved, respondent collected admissions taxes through one of its branches aforesaid and made a return to the Collector of Internal Revenue in Atlanta, Georgia, and paid the tax (R. 351, 352). Thereafter, it filed a claim for refund setting up the unconstitutionality of the Federal Admissions Tax Act as applied to it and sought a refund of the amounts paid into the Treasury Department (R. 320-322). This claim for refund was rejected by the Commissioner of Internal Revenue on the ground that since respondent was not the taxpayer and had acted merely as a collecting agency for the Federal Government, the remedy by claim for refund was not available to it (R. 324). In rejecting the claim solely on this ground, the Commissioner stated:

> "Thus the tax does not fall on the University or the Athletic Association but upon the persons admitted to the athletic events and the University merely acts as collecting agency in collecting the tax due and turning it over to the Collector of Internal Revenue. The admission charges and the free and complementary admissions to the athletic contests of the Georgia Tech Athletic Association are therefore properly subject to tax. *The evidence on file shows that the tax claimed in refund was collected from the persons admitted to the Contests and was not paid from the funds of the Association or the University*" (R. 325).

Respondent, having collected the taxes involved in said claim for refund (that is, having consented to act as a collecting agency) and therefore not being the "taxpayer", recognized the correctness of this ruling of the Commissioner of Internal Revenue.

Respondent then refused to collect any further taxes and simply, for the purpose of protecting its personnel from criminal prosecution (R. 196), made the notation on each of its tickets of admission hereinabove described. The assessment and levies above described followed this action on the part of respondent.

The Treasury Department, contending that respondent has collected the admission tax, now takes the position that the remedy by injunction is not open to respondent and it is asserted in the application for certiorari that "The Circuit Court of Appeals erred—in holding that respondent had standing to contest the validity of the tax." Thus has the Treasury Department consistently ruled that the validity of the tax cannot be challenged by one who has collected the tax.

The case of *U. S.* v. *First Capitol National Bank of Iowa*, 89 F. (2d) 116 (C. C. A. 8th), moreover, clearly shows the impossibility of questioning the constitutionality of the Act involved, by one who has collected the tax.

There the University of Iowa actually collected the admissions tax and deposited it in the Bank. The United States brought suit against the bank to recover, under the provisions of Sec. 1114 (e) (f) of the Revenue Act of 1926 (U. S. C. A., Title 26, Sec. 1610) for the amount which the bank had refused to surrender upon the levy. The Eighth Circuit Court of Appeals, placing its decision solely on the ground that the State University *had consented* to act as a collecting agency for the United States and *had collected* the tax, held that the tax money belonged to the United States, and said:

"The Federal tax so collected was deposited by the board in control in defendant bank * * *. When the board in control, with the consent of the University of the State of Iowa, undertook to act and did act as collecting agent for the United States in the collection of the federal admission tax, its relationship with the University of the State of Iowa with respect to the federal tax collected became of secondary importance. It was governed, while so acting for the United States, by the Statutes of the United States and the regulations issued thereunder. * * *

"The State University, *having acquiesced in the collection of the admission taxes* for the United States by the board in control, may not in this action against the bank assert ownership in itself of the federal taxes so collected."

Consequently the ruling of the trial court "that the validity of the federal tax cannot be litigated by the defendants in the present action," was affirmed by the Eighth Circuit.

The Iowa case clearly demonstrates the utter futility of the procedure of collecting a tax and then seeking to contest the validity of the tax by way of refund. This is necessarily true, as a State government or State university may consent to act as a collection agency for the United States (as did the University of Iowa by collecting the tax) and if it does, the money collected belongs to the United States.

E. Respondent Could Not Have Attempted Procedure by Paying the Amount Assessed and Seeking Refund, Because Tax is Laid Against Patrons.

Neither could respondent have paid with its own funds the amount of the admissions tax to the Treasury Department and sought its recovery by claim for refund. This situation was due to the fact that the admissions tax is laid, not on the vendor of the ticket of admission, but on the purchaser. (26 U. S. C. A., Sec. 940). We have heretofore

pointed out that only the "taxpayer" can proceed by claim for refund.

As above pointed out, moreover, no tax was collected for the period here involved, and, as further pointed out, for the period in 1932, when the tax was collected and paid to the Treasury Department, respondent's claim for refund was met with the ruling that only the taxpayer could so proceed.

F. Even if Respondent Could Have Secured a Return of Funds in This Way, it Would Not Thereby Have Been Accorded Adequate Remedy, Because it Would Have Imposed on it the Burden of Acting as Federal Collecting Agency Which Burden Cannot be Imposed Upon a State Without its Assent.

In Part One of this brief we have pointed out that it is a burden upon a State to be required to collect taxes for the Federal Government; consequently, if it did have open to it the remedy of collecting an illegal tax, paying it to the Government and then filing claim for refund, there would be no way for the State to relieve itself of the burden placed on it of collecting the tax.

G. Procedure by Claim for Refund if Available Would Not Accord Adequate Remedy Because it Would Impose on Respondent the Obligation to Collect from Patrons Taxes Not in Fact Due Federal Government. State Officials Should be Relieved of Such Inequitable Requirement.

For the reason stated under sub-division "f" above, the remedy by claim for refund, if available, would not be adequate. State officials should not be required to collect

an illegal tax as a condition precedent to the opportunity to contest the validity of the tax.

H. State is Entitled to Remedy to Relieve its Funds from Liens and Relieve it of a Multiplicity of Suits.

The Collector filed notices of lien under provisions of Revised Statutes 3186 (Title 26, U. S. C. A., Section 1560, 1561). As required by this section of the revised statutes, the Collector filed the lien notices with the Clerk of Superior Court of Clarke County, Georgia, and with the Clerk of the District Court wherein Clarke County is located (R. 257). In this connection, Revised Statutes 3186 provides that, where there is a failure or neglect to pay the tax demanded, the tax will become a lien until it is satisfied. It further provides that to be effective against subsequent purchasers, mortgagees, or judgment creditors, notice of lien must be filed in accordance with the law of the State where the property is situated or in the office of the Clerk of the District Court for the district. There is, therefore, this additional ground for equitable remedy herein, in that the filing of the lien placed a cloud on the title of the property of respondent held by it as an agency of the State of Georgia.

In like manner, it would be utterly impossible to recover all of the admissions penalties in one suit even if they were paid to the Federal Government. This results from the fact that admissions are collected by the respondent approximately ten months (the school year) of each calendar year (R. 10, 381, 385). Indeed, the answer of the Collector herein discloses that there is already pending another suit brought by respondent with respect to the same tax for a period in 1933 (R. 91).

3.

Substitution of Successor Collector Clearly Authorized by Section 11 of the Act of February 13, 1925. (U. S. C. A., Title 28, Section 780.)

Substitution of Marion Allen, the successor Collector, was based on Section 780 of Title 28, of U. S. Code, Annotated, which provides.

> "Where, during the pendency of an action, suit or other proceedings brought by or against an officer of the United States * * * and relating to the present or future discharge of his official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the Court where the action, suit or proceedings is pending, whether the court be one of first instance or an appellate tribunal to permit the case to be continued or maintained by or against the successor. * * *"

On the face of it, this statute was intended to relieve just such difficulty as was presented in the present case. This suit, as hereinbefore recited, presents a history of a long effort on the part of respondent to determine the validity, as applied to it, of the statute herein involved. The resignation of the original Collector, W. E. Page, and the substitution of his successor had no more practical bearing on the conduct of the litigation or the determination of these questions than would the death of an expert on plant pathology in the Department of Agriculture. We were, nevertheless, faced with the application of the representatives of the Government to have the whole litigation treated as a nullity and a new suit required against the new Collector.

We believe it is perfectly clear, in the light of the history of this section, that it was intended to avoid just such a result. In considering its history we must bear in mind that the claim of the Government is predicated on the technical view that a suit to enjoin an officer acting beyond

his authority is personal as to the officer. This, of course, is true, but the history of the present section shows that it was intended to cover just such suits which, while technically personal, are really suits affecting the official conduct of the officer. Indeed, the history of the section leaves no possible doubt on this point. *Bernadin* v. *Butterworth*, 169 U. S. 600, was a suit for a mandamus against the Commissioner of Patents. Pending the suit the Commissioner died and an effort was made to substitute his successor. The Supreme Court held that it could not be done for the same technical reason now advanced by opposing counsel, viz., because a mandamus against an officer who was wrongfully refusing to act was personal as to the officer. It should be noted, therefore, that the *Butterworth* case, a suit in which the substitution was refused, was a suit that was just as much personal to the officer as is the present case against the Collector. To make the foregoing perfectly clear, we quote from *Bernadin* v. *Butterworth*, as follows:

> "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But, no matter out of what fact or relations the duty has grown, what the law required, and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him

> the relator has a clear right. * * * When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And, if a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty, and render the interposition of the court unnecessary. In all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative."

In *ex parte LaPrade*, 289 U. S. 444, the Court says (see p. 457) that this statute was passed to relieve the situation pointed out in *Bernadin* v. *Butterworth*. That is to say, because of the technical rule that a mandamus or an injunction against a public officer acting wrongfully in his official conduct was personal as to him and hence his successor could not be substituted, therefore, the Court says the Congress passed this statute to allow the substitution to be made as against this technical rule.

Substitution was refused in the *LaPrade* case because a State officer was involved and the Court held that the part of Section 780 of Article 28 of the U. S. Code which permitted the substitution of State officers could only be applied where the States had themselves passed statutes consenting to such substitution. But the Court expressly distinguishes this from the case of Federal officers where the power of Congress is plenary and where the consent of Congress for the substitution has been given.

The *LaPrade* case, cited in the application for certiorari herein, therefore, instead of sustaining the position of opposing counsel, is in effect conclusive that the right of substitution exists.

Let us see what a contrary view as to the construction of this statute would lead to. A suit against an officer for mandamus or injunction for wrongful action in the course

of his official duties is personal. This is always true in a technical sense; but no suit is ever brought against such an officer except on the claim that his conduct is unlawful, and if, because of that, the suit was not within the statute as to substitution, there could never be a case that would be within the statute.

It is, therefore, clear that this statute was intended to prevent such travesties on justice as would result in the present case from nullifying everything that has been done on account of the Collector's resignation. It may be well to note that the cases holding that a successor collector cannot be substituted in suits to recover refunds, are not in point because in those cases a common law judgment results and the proper party to be substituted is the administrator or executor of the Collector.

Furthermore, the *LaPrade* case points out that the Court does not mean to hold that "a successor in office who adopts the attitude of his predecessor" could not be substituted, even independently of the statute under consideration. And, as pointed out by Judge Sibley below (R. 432), the successor Collector admitted his intention of proceeding with the assessment herein involved.

Respectfully submitted,

M. J. Yeomans,
Attorney General of the State of Georgia.
Marion Smith,
Special Assistant Attorney General of the State of Georgia.
M. E. Kilpatrick,
Special Assistant Attorney General of the State of Georgia.
Hamilton Lokey,
Special Assistant Attorney General of the State of Georgia.

P. O. Address; 1045 Hurt Bldg.
Atlanta, Ga.

APPENDIX.

Educators Regard Athletic Contests as Sound Part of Program of Physical Education.

There is a large amount of literature available on this subject. It is, of course, not free from conflicting opinions. Certainly many aspects in the past of intercollegiate athletics have been the subject of criticism. We would be less than frank if we failed to admit that a part of this criticism has been just, although much of it has suffered from the chronic American fault of gross exaggeration.

Anyone really familiar with the developments in this field knows that a large part of the things which have heretofore been the subject of criticism have been either corrected or are on the way to correction. Most of the criticism of intercollegiate sports, either expressed or implied in this case reflects a lack of comprehension of actual current developments in the educational world. As some illustrations of educational thought on this subject, the following are submitted:

In 1934 Drs. Williams and Brownell, both of the Teachers College of Columbia University, published a work entitled "The Administration of Health and Physical Education." Chapter 17, commencing on page 405, deals with the subject "Intramural and Interscholastic Athletics." The chapter begins with a brief reference to the development of such sports as an uncontrolled student activity. On page 405 we quote the following:

> "Slowly school authorities came to the realization that responsible leadership was essential."

From page 406, under the title "The Educational Value of Athletics," we quote the following:

> "In fact many of the desired outcomes of modern athletics are identical in purpose with those of general education. Like other departments of the school program, intramural and interscholastic contests possess inherent qualities which contribute to complete educa-

tion. If personal happiness and service are worthy ideals of education, what better opportunity is provided in the public school for the realization of these outcomes than the happiness derived from participation in athletics—situations fraught with dramatic intensity and adventurous appeal—or the exemplification of true service with which the player submerges personal glorification for the best interests of his group,''

And on page 407 we quote:

''*Athletics a Part of Physical Education.*—Within a few short years the control of athletics has passed from students and spectators to superintendents and principals. Under the guidance of these educational administrators, responsible persons have been employed to protect and develop the educational values of such activities. Most of this leadership has been assumed by teachers of physical education, the majority of whom are experienced and highly skilled technicians who have received their training in one of the numerous professional schools throughout the country. Notwithstanding the occasional example of athletic programs organized and conducted for commercial purposes, or for the amusement of spectators who are educationally disinterested—with the usual attending evils of overemphasis—the administrative principle is established that athletics belong to the school and that they are a part of physical education.

''Acceptance of this policy is evidenced by a regulation of the North Central Association of Colleges and Secondary Schools which reads, 'All athletic competition should grow out of and form an integral part of the physical education program * * *.'''

What is true of interscholastic athletics, as discussed by these writers, is true to a larger extent of intercollegiate athletics, in that responsible faculty control developed earlier in the college field and has become more complete, except, perhaps, for a few colleges which are noted for being

somewhat outlaws in this respect. It should be borne in mind in the present case that the record shows, without contradiction, that the Southeastern Conference, having jurisdiction over intercollegiate contests in this area, has definitely adopted rules requiring faculty control of athletics; also for the regulation of athletics. Both the University of Georgia and the Georgia School of Technology comply with these rules, and faculty control is at both institutions complete.

In 1936 Dr. Williams of Columbia, this time in collaboration with Dr. Hughes of the Teachers College at Columbia, published a work under the title "Athletics in Education." It is a most helpful work for anyone interested in the subject. It should be noted at this point that the Teachers College at Columbia is recognized as the leading school of education in the United States. Its preeminence in original research and study in the field of education has been acquired under the long leadership of Dr. Kilpatrick. Studies on the subject of education, coming from the Teachers College of Columbia, while not necessarily conclusive, can safely be accepted as representing the views of a recognized authority.

We quote from page 56:

> "*Physical Education, an Aspect of Education.*—A transformation within physical education itself is favoring the incorporation of all phases of athletics within the department of physical education and the conduct of the program of physical education from an educational point of view. These changes have been going on rapidly during the last twenty years. They are in part a reflection of the same influences that have been reshaping American education along functional lines and in part an expression of modern psychology and educational philosophy upon it.
>
> "Out of new statements of aim, objectives, methods, principles, and programs, have come more clearly than ever before recognition of (1) the unique, educative values in physical education, (2) its opportunities for wholesome development of young people, and (3) the

contribution of its learned activities to life, its work, and its pleasures."

From page 59 the following statement:

"It would appear, therefore, that physical education provides, through its sports and games, unique educative opportunities in socialization, the setting-up of standards, and the formation of attitudes."

In 1934, at a meeting of the National Collegiate Athletic Association, held in New York, Dean Herbert E. Hawkes of Columbia College gave an address at a meeting of coaches, in which he described their position as part of the faculties of their colleges in the following language:

"Since we agree that the whole boy must be trained, your work is absolutely essential in bringing to the surface in each boy with whom you come in contact the qualities of mind and character that your specialty naturally evokes. Each of you knows what that is. The games of baseball, of basketball, of football, of tennis, each and all have contributions to this training of the whole man. But this is not all. You are each a member of a staff of teachers, of history and chemistry and all of the rest."

Proceedings, National Collegiate Association, 1934, page 95.

In the work entitled "Higher Education in America," by Dr. Raymond A. Kent, President of the University of Louisville, published in 1930, Ch. 19 is devoted to the subject "Physical Education and Athletics." While this book was compiled by Dr. Kent various chapters have been written by others, the particular chapter being by Dr. Foster C. Allen, Director of the Division of Physical Education in the University of Kansas. The whole chapter is interesting. The conclusion reached by the author is the following:

"Modern physical education founded on the primary basis of sports and games is the most effective program of its kind in our universities and colleges today."

Perhaps the nearest approach to an authoritative statement of the views of the educators as a whole that can be found is the report on "Intercollegiate Football," by a Committee of the American Association of University Professors, published as a bulletin of that Association under date of April, 1926, being Vol. 12, No. 4. It is an exhaustive study of the subject up to that time from the standpoint of the advantages and disadvantages of intercollegiate sports as a part of an educational program, with a number of recommendations for improvement. The most important of these recommendations is the extension of faculty control, as it has been extended with both of the institutions now before the court. The report as a whole is overwhelmingly favorable to the position that such intercollegiate sports have high educational value and should be retained as a part of the program of college education. It is too lengthy to quote.

An address by President Ernest M. Hopkins, Dartmouth College, under the title "The Place of Athletics in an Educational Program," is published in the proceedings of the National Collegiate Athletic Association for December, 1925. His address is so convincing that we regret we can quote only briefly from it. It is based upon one fundamental idea which every thoughtful man must recognize, namely—you cannot shut up youthful interests within the bounds of a curriculum of study only. There never has been a time when this has been done and it would be unfortunate if it could be accomplished. No more sound or valuable outlet for student activity has ever been found than intercollegiate athletics and the accompanying intramural athletics which they stimulate and develop. We quote the concluding statements in the address, pages 96-97:

> "Returning, for a moment, to the distinction which I earlier made between the curriculum life of the college and the community life, I wish to reiterate this thought. Sense of such indispensable attributes for community life as the will for cooperation, team play, and the willingness to forget self for advantage of the group, are inculcated largely in the community life of the college, and can be but little inculcated elsewhere.

Character development, moral stamina, those forms of generosity which we call sportsmanship, are produced in the actual life of the college community, and in this the greatest single agency for their production is the institution of intercollegiate athletics.

"The stimulated intellect is, of course, the primary purpose of the college. But is not the man whose intellect has been stimulated doubly valuable to society when he is qualified to become an effective agent in the community in which he lives? As preparation for this, the ideals of the college community have influence beyond reckoning. No agency of the undergraduate life so powerfully binds the college community together nor, on the whole, so advantageously permeates it ideals as do the undergraduate sports. Hence, let us not deny them either the consideration or the credit which is rightfully theirs."

"Athletics *have* a desirable place in the American college!"

As a practical test of whether the theories of the great majority of educators who approve intercollegiate sports are correct we quote from an address by Hon. Newton D. Baker, delivered December, 1919, just after the close of the World War, to the National Collegiate Athletic Association, and printed in the Proceedings of the Association for December of that year. Page 81:

"If it had not been for the college gymnasium and the athletic field, I venture to say that the American Army could not have been officered in any such small space of time, for we needed not only the trained mind and trained muscles of the American youth, but we needed the spirit of fair play. We needed the spirit of teamwork, the spirit of organized games, which has come to be the characteristic of college athletics. We needed all of that, and it was a contribution of inestimable value, and one which in any future emergency that confronts this country we must look to you again to supply."

It is a statement comparable to that of the Duke of Wellington, that the Battle of Waterloo was won on the football fields of Eton and Harrow.

And as another opinion outside of college faculties, as to whether college athletics are really justifying the opinion of those who approve of them as a part of an educational program, we quote from an address by Dr. George J. Fisher, Deputy Chief Executive, Boy Scouts of America, delivered at the December, 1927, meeting of the National Collegiate Athletic Association and reported in its proceedings of December, 1927, as follows:

> "There is no group of men in America, in my judgment, that is doing more in a wholesome way for the youth of America than the group in this Association. All praise to them."

Lastly under this part of the brief we quote from an address of Dr. Charles W. Kennedy of Princeton, and Chairman of its Board of Athletic Control; the quotation being from an address delivered by him to the National Collegiate Athletic Association, December, 1924, and published in its proceedings of that year, page 87:

> "What, then, is this system of college athletics with which we are dealing and what is its true place in the corporate life of a college or a university, I recognize, of course, that it has a value in improving the physique of a growing boy. I recognize that it has a value in affording an outlet for the natural human desire for the playing of games. But the intensity of my faith in college sports is not based on either of these grounds. It is based upon the conviction that college athletics properly supervised and properly developed afford a laboratory training for the development of character such as is not afforded elsewhere in the life of an undergraduate. I am glad to have this opportunity to define my faith."

We believe that a fair summary of current thought among educators on this subject would be about the following:

The very rapid development of intercollegiate contests naturally brought with it a certain number of recognized evils. These have to a large extent been eliminated; responsible faculty control has been established; and adequate machinery is now functioning to preserve the useful character of such contests, to eliminate in the main remaining evils, and to prevent their recurrence. The overwhelming conclusion among educators is that the inherent educational value of such contests, properly controlled, is great and should and will be preserved as a permanent part of the educational program of this country.

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 28 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR RESPONDENT.

M. J. YEOMANS,
Attorney General of the State of Georgia.
MARION SMITH,
Special Assistant Attorney General, State of Georgia.
M. E. KILPATRICK,
Special Assistant Attorney General, State of Georgia.
HAMILTON LOKEY,
Special Assistant Attorney General, State of Georgia.

BLANK

PAGE

INDEX.

Subject Index.

	Page
Reply brief for respondent	1
Under procedure suggested by petitioner respondent without adequate remedy at law by refusing to collect tax	2

Table of Cases Cited.

McFarland v. *American Sugar Ref. Co.*, 241 U. S. 82	3
Pennsylvania v. *Fix, Collector*, 7 Fed. Sup. 729	5
Rickert Rice Mills, Inc., v. *Fontenot*, 297 U. S. 110	3
Stafford v. *Wallace*, 258 U. S. 495	3
Young, Ex parte, 209 U. S. 123	3

Statutes Cited.

U. S. C. A., Title 26, Sec. 1645, sub-sec. (c) (R. S. 3214)	5
Rev. Stat. 3224	5

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, Collector of Internal Revenue for the District of Georgia,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

REPLY BRIEF FOR RESPONDENT.

Under Procedure Suggested by Petitioner Respondent Without Adequate Remedy at Law by Refusing to Collect Tax.

At the time of filing our original brief we had supposed it necessary to point out at some length why the respondent could not follow the supposed remedy of collecting the tax and paying it into the treasury and filing suit for a refund. It is apparent now from the brief of the petitioner that the Government does not claim that any such remedy could be followed, but on the contrary agrees that if respondent collected the tax and paid it in it would be without standing to question its validity.

The claim advanced, however, as to the method which respondent, it is said, could pursue, is predicated on the proposition that respondent must refuse all compliance with the statute if it wishes to question the validity of the exaction. The plan which the brief of petitioner suggests could be followed is set out on page 39 of that brief. It involves the following steps: (1) A refusal to collect the tax; (2) if an assessment is, nevertheless, made against petitioner, then the paying of the tax by petitioner; and (3) suing for a refund upon the ground that petitioner had not collected the tax. Such procedure does not afford an adequate remedy for two reasons:

(1) It would expose State officials, their agents and representatives to the risk of grave criminal penalties should their position not be sustained; and

(2) The procedure suggested would not make it possible to raise in that procedure the constitutional question now before the Court.

As to the first of these objections, attention is called to pages 39 and 40 of our brief, in which we point out the penalties to which the State officials and their agents would be subjected should they be mistaken in their judgment on this constitutional question. They involve money penalties, misdemeanors, and felonies. It is submitted as practically self-evident that there must be some way whereby State officials, faced with a demand which they regard as unconstitutional, can assert their constitutional position in the appropriate court without subjecting themselves to such penalties and risks.

Even as to private individuals, equity grants relief from compliance with a statute attacked as unconstitutional where the penalties attached to testing the statute in any other way are so severe as to make such test otherwise

practically impossible. This has been the rule at least since *Ex parte Young*, 209 U. S. 123.

See also, *McFarland* v. *American Sugar Ref. Co.*, 241 U. S. 82.

In *Stafford* v. *Wallace*, 258 U. S. 495, the court said:

> "In each bill the averments are sufficient if the act be invalid, to show equitable grounds for injunction in the severe penalties incurred for failure to comply with the act before opportunity can be given to test its validity. Ex parte Young, 209 U. S. 123."

In the instant case the State authorities undertook to go as far as they could in preserving all rights of the Government under this statute should the position of the State authorities prove unfounded. They, in effect, did what this Court later ordered to be done as a condition of granting a remedy against a Federal tax in *Rickert Rice Mills, Inc.*, v. *Fontenot*, 297 U. S. 110, namely: They deposited a sum equal to the claimed tax in a special account for safekeeping, for the obvious purpose of protecting the rights of all parties pending a determination. They also placed upon the tickets a statement of the amount allocated as a tax in the event, but only in the event, the State's constitutional provision should not be sustained; and having done all of this voluntarily they then brought a suit in equity to restrain not only the immediate levies but the further enforcement of the tax pending a final determination.

Had they followed the plan outlined in the brief of opposing counsel, they would have been compelled to face the same issue as to the collections of every athletic contest held by them to which the tax could be applied. If they collected the tax and paid it in as to subsequent contests they could not recover it back, and each time a contest was held at which the tax was not collected and paid in they would expose themselves to a new set of penalties and crim-

inal prosecutions if their constitutional advice proved unsound.

It would, of course, consume some time for the test case which we have assumed to reach the Supreme Court of the United States for final determination. The magnitude of the penalties, including possible imprisonment, which could have accumulated in such a period would make the risk an impossible one and would in effect prohibit any such procedure being followed. It may be that Federal officials would not in such a situation have demanded the full penalties provided by law if they were successful in the test case. But even private individuals, under the principle of *Ex parte Young*, are not required to run any such risk; and surely it is wholly incompatible with the relationship between the States and the Federal Government to assert that State officials faced with an exaction by Federal officials, which they believed to be unconstitutional, cannot raise the question in any way except by facing a risk of this character.

Furthermore, a test case raised in the way suggested on page 39 of the opposing brief would not in fact raise the constitutional question at all. The procedure suggested as pointed out is to refuse to collect the tax and then to pay it over and sue for a refund. With reference to this the opposing brief says:

> "And in such actions they could have litigated the question whether, under the facts of the case, they had collected the tax or not. In such a suit a determination that they had not collected the tax would result in a judgment in their favor unless the Court determined a liability under Sec. 1114(d) for a penalty. In that event the opportunity would be afforded to raise the constitutional question."

It is quite true that the State officials in such suit could raise the contention that they had not collected the tax and

could, therefore, recover the tax. But it is not correct to say that the court in that suit could determine whether there was an offsetting liability for a penalty under Sec. 1114(d). The reason for this statement is that a suit against the Collector would, under familiar principles, be a personal suit in contemplation of law. In such a personal suit he would not have the right to off-set a penalty due the United States even in the same amount.

U. S. C. A., Title 26, Sec. 1645, sub-sec. (c) (R. S. 3214) provides:

> "All suits for fines, penalties, and forfeitures, when otherwise provided for, shall be brought in the name of the United States" etc.

Obviously, therefore, a liability to the United States could not be off-set by the Collector in a suit which, in contemplation of law, is a personal claim against him for his individual tort. Hence the suggested procedure would not in fact raise this constitutional question.

On the question of the remedy that the State of Georgia might have had, we therefore come to this final conclusion: Petitioner cannot suggest any remedy except one that would involve the grave penalties, etc., which we have pointed out, and even that remedy would not actually raise the constitutional question.

We have cited in the Brief heretofore filed the case of *Pennsylvania* v. *Fix., Collector,* 7 Fed. Sup. 729. This is the decision of a District Court on motion of the State of Pennsylvania to remand the case to the State Court where it was originally instituted, and the District Court on the motion to remand held that R. S. 3224 was inapplicable since an effort was involved whereby it was sought to tax the governmental function of a State.

We desire to call the Court's attention to the fact that in 79 F. (2d) 520, is found the report of the decision of the

Circuit Court of Appeals in the same case wherein the later decision of the District Court dismissing the suit on its merits was affirmed. Although not reported, the decision of the District Court, as stated by the Circuit Court of Appeals, was that the State in selling whiskey was not engaged in an essential governmental function and that R. S. 3224 was applicable. However, we do not understand the effect of the later decision of the Circuit Court of Appeals as detracting anything from the decision of the District Court on motion to remand, at a time when the District Court construed the activity of the State as being an essential governmental function. In other words, as long as the Court determined the activity to be essentially governmental, there was an exceptional circumstance, and R. S. 3224 would not apply, but after reaching the conclusion that the function was not governmental then R. S. 3224 would apply.

Respectfully submitted,

M. J. YEOMANS,
Attorney General of the State of Georgia.
MARION SMITH,
Special Assistant Attorney General State of Georgia.
M. E. KILPATRICK,
Special Assistant Attorney General State of Georgia.
HAMILTON LOKEY,
Special Assistant Attorney General State of Georgia.

BLANK

PAGE

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 20 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 882.

W. E. PAGE, Collector of Internal Revenue,
Petitioner,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

AMICI CURIAE BRIEF.

ROY H. BEELER,
Attorney-General of Tennessee,
Nashville, Tennessee.

NAT TIPTON,
Assistant Attorney-General of Tennessee,
Nashville, Tennessee.

HENRY B. WITHAM,
Counsel, University of Tennessee,
Knoxville, Tennessee.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

BLANK

PAGE

INDEX.

	Page
Motion for leave to file brief as amici curiae	1–2
Amici curiae brief	3–10
Opinion below	3
Question presented	4
Statute involved	4
Argument	5
Education is a governmental activity	5
The University System of Georgia is engaged in education as an arm of the state	6
A comprehensive system of education including physical education and athletics	6
Any tax on a state governmental activity is a burden	9
The extent of the tax is not determinative of the right to impose it by either the state or the federal government upon "governmental" enterprises of the other	9
Conclusion	10

Citations.

Cases:

Ambrosini v. United States, 187 U. S. 1, 123 S. Ct. 1 (1912)	10
Anderson v. Board of Education, 49 N. D. 181, 190 N. W. 807 (1922)	7
Bauer v. State Board of Agriculture, 164 Mich. 415, 129 N. W. 713 (1911)	5

Cases (continued):

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937), at p. 373 ..... 5, 9
German Gymnastic Association v. City of Louisville, 117 Ky. 958, 80 S. W. 201 (1904) 7
Indian Motorcycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 609 (1931) 9
Mokovich v. Independent School District No. 22, 177 Minn. 446, 255 N. W. 292 (1929) 6
Pan Handle Oil Co. v. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928) 10
People v. Pommerening, 250 Mich. 391, 230 N. W. 194 (1930) 7
People v. Kewen, 69 Cal. 215, 10 P. 393 (1886) 5
People ex rel. Drake v. Regents, 4 Mich. 98 (1856) .. 5
Regents v. Auditor General, 167 Mich. 144, 132 N. W. 1037 (1911) 5
South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905) 8, 9
Spencer v. School District No. 1, 121 Ore. 511, 254 P. 357 (1927) 6
State v. Chase, 175 Minn. 259, 220 N. W. 951 (1928) 5
State ex rel. Black v. State Board of Education et al., 33 Idaho 415, 196 P. 201 (1921) 5
State ex rel. Heimburger v. Board of Curators of the University of Missouri, 268 Mo. 598, 188 S. W. 128 (1916) 5
State ex rel. Public Service Commission v. Brannon et al., 86 Mont. 200, 283 P. 202, 67 A. L. R. 1020 (1929) 5
State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484 (1912) 7
State of Georgia v. Regents of the University System of Georgia, 179 Georgia 210 (1934) 6

Cases (continued):

Sterling v. Regents of the University of Michigan, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150 (1896) 6
University of Tennessee v. People's Bank, 157 Tenn. 87, 60 S. W. (2nd) 328 (1928) 6
Wallace v. Regents, 75 Cal. App. 274, 242 P. 892 (1925) 6
Williams v. Wheeler, 23 Cal. App. 619, 138 P. 937 (1913) 6

Statutes:

Georgia Code of 1933, Title 32, Chap. 1 6
Revenue Act of 1926 (44 Stat. 91) 4
Revenue Act of 1932 (47 Stat. 271) 4

BLANK

PAGE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 882.

W. E. PAGE, Collector of Internal Revenue,
Petitioner,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned move for permission to file the following Brief as Amici Curiae herein.

The question involved in the present case is whether the Government of the United States can compel the Regents of the University System of Georgia to collect a federal tax imposed on purchasers of tickets for admission to athletic events conducted by the Regents of the University System of Georgia and to pay over said tax to the Collector of Internal Revenue of the United States Government.

The undersigned are, respectively, attorneys for the State of Tennessee and the University of Tennessee. The University of Tennessee is the State University of Tennessee and has paid under protest to the Collector of Internal Revenue the tax on admissions to football games collected by the University of Tennessee under an arrangement similar to the one under which admissions were collected by the University System of Georgia. Hence the question involved in this case is, in most particulars, the same question involved in the controversy between the University of Tennessee and the Collector of Internal Revenue.

The attorneys for the respondent have consented in writing to the filing of a brief by the undersigned, and notice of this motion has been given to counsel for petitioner.

Witness our signature this 18th day of April, 1938.

ROY H. BEELER,
HENRY B. WITHAM,
Amici Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 882.

W. E. PAGE, Collector of Internal Revenue,
Petitioner,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

AMICI CURIAE BRIEF.

OPINIONS BELOW.

This case was begun in the United States District Court, Northern District of Georgia, Atlanta Division, wherein defendant's motion to dismiss was granted. The opinion is reported as Regents of University System of Georgia v. Page, Collector of Internal Revenue, 10 F. Supp. 901 (1935). Plaintiff appealed, and the Circuit Court of Appeals reversed and remanded the cause. Regents of University System of Georgia v. Page, 81 F. (2nd) 577 (1936). Upon a rehearing the District Court granted a decree for the

plaintiff. Regents of University System of Georgia v. Page, 18 F. Supp. 62 (1937). Upon an appeal by defendant decree affirmed. Page v. Regents of University System of Georgia, 93 F. (2nd) 887 (1937). Petition for writ of certiorari granted by United States Supreme Court April 11, 1938.

QUESTION PRESENTED.

Whether the Government of the United States can compel the Regents of the University System of Georgia to collect a federal tax imposed on purchasers of tickets for admission to athletic events conducted by the Regents of the University System of Georgia and to pay over said tax to the Collector of Internal Revenue of the United States Government.

STATUTE INVOLVED.

The statute is Section 500 of the Revenue Act of 1926, 44 Stat. 91, amended by Section 711 of the Revenue Act of 1932, 47 Stat. 271, 26 U. S. C. A., Sections 940-944, inclusive, and imposes "A tax of 1 cent for each ten cents or fraction thereof of the amount paid for admission to any place * * * to be paid by the person paying such for admission." Exemptions do not include "admissions to any athletic game or exhibition the proceeds of which inure wholly, or partly, to the benefit of any college or university. * * *"

ARGUMENT.

An analysis of the question presented permits its breakdown into two subdivisions:

1. Is the conduct of athletic events by the Regents of the University System of Georgia a state "governmental" activity?

2. Is the federal tax a "burden" upon the exercise of a "governmental" activity?

IN REGARD TO SUBDIVISION NO. 1.

Education Is a Governmental Activity.

With the thought that perhaps judicial notice may not be taken that education is a governmental activity, the following citations are given:

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937), dictum at p. 373.

Bauer v. State Board of Agriculture, 164 Mich. 415, 129 N. W. 713 (1911).

People v. Kewen, 69 Cal. 215, 10 P. 383 (1886).

People ex rel. Drake v. Regents, 4 Mich. 98 (1856).

Regents v. Auditor General, 167 Mich. 144, 132 N. W. 1037 (1911).

State v. Chase, 175 Minn. 259, 220 N. W. 951 (1928).

State ex rel. Black v. State Board of Education et al., 33 Idaho 415, 196 P. 201 (1921).

State ex rel. Heimburger v. Board of Curators of the University of Missouri, 268 Mo. 598, 188 S. W. 128 (1916).

State ex rel. Public Service Commission v. Brannon et al., 86 Mont. 200, 283 P. 202, 67 A. L. R. 1020 (1929).

Sterling v. Regents of the University of Michigan, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150 (1896).

University of Tennessee v. People's Bank, 157 Tenn. 87, 60 S. W. (2nd) 328 (1928).

Wallace v. Regents, 75 Cal. App. 274, 242 P. 892 (1925).

Williams v. Wheeler, 23 Cal. App. 619, 138 P. 937 (1913).

The University System of Georgia Is Engaged in Education as an Arm of the State.

Georgia Code of 1933, Title 32, Chapter I.

State of Georgia v. Regents of the University System of Georgia, 179 Georgia 210, 175 S. E. 567 (1934).

A Comprehensive System of Public Education Includes Physical Education and Athletics.

Spencer v. School District No. 1, 121 Ore. 511, 254 P. 357 (1927), in which an action for personal injuries based upon the negligence of a school district in placing a radiator in the gymnasium hall used in connection with the school was decided favorably to the school district on the theory that the school was engaged in a governmental activity.

Mokovich v. Independent School District No. 22, 177 Minn. 446, 255 N. W. 292 (1929), in which an action was brought against the school district for injuries suffered by plaintiff, a member of the football team of the school operated by the defendant. The decision in this case was favorable to the school district on the theory that athletic games and other contests were a part of its educational system.

Anderson v. Board of Education, 49 N. D. 181, 190 N. W. 807 (1922), in which it was held that the Board of Education was exercising a governmental function in providing equipment for playground use.

State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484 (1912), in which it was held that a school district may use the power of eminent domain to acquire lands for playgrounds which might be used for the common athletic games current among schools of that class.

People v. Pommerening, 250 Mich. 391, 230 N. W. 194 (1930), in which it was held that the University of Michigan could condemn land for a golf course.

German Gymnastic Association v. City of Louisville, 117 Ky. 958, 80 S. W. 201 (1904), in which it was held that a gymnasium association should be exempt from taxation. The Court said:

> Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the State as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. * * *

> If one institution affords an opportunity to acquire this perfect education, it is one of education. If three institutions are organized—one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce a better physical development—each is an institution of education, as much as the one at which the student can acquire the threefold knowledge. It is simply a matter of judgment or convenience, on the organization of institutions of education, whether one shall furnish all the opportunities for the acquisition of an education or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation.

Since a comprehensive system of public education includes physical education and athletics, and since the University System of Georgia is engaged in education, and since education is a governmental activity, it must therefore follow that the conduct of athletic events by the Regents of the University System of Georgia is a "governmental" activity of that state.

IN REGARD TO SUBDIVISION NO. 2.

Admittedly every activity in which a state may engage is not nontaxable. If the state has "stepped down" and engaged in an enterprise which is essentially private business it may be taxed by the Federal Government.

> South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905).

But it should be pointed out that such a tax is allowed, not because it is not burdensome upon a state function, but

because it is a state function which is not "governmental." Hence **South Carolina v. The United States** is not in point in the instant case.

Any Tax on a State "Governmental" Activity Is a Burden.

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937). The Court said, at page 364 of the official report:

> But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, "are as independent of the general government as that government within its sphere is independent of the states." * * * And, as it was said in **Texas v. White**, and often has been repeated, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other. * * *

The Extent of the Tax Is Not Determinative of the Right to Impose It by Either the State or the Federal Government Upon "Governmental" Enterprises of the Other.

Indian Motorcycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 609 (1931).

Pan Handle Oil Co. v. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928).

Ambrosini v. United States, 187 U. S. 1, 123 S. Ct. 1 (1912).

Since any tax, regardless of size, upon the exercise of "governmental" activity is, to the extent of the tax, a control of that "governmental" activity, it follows that it is a burden which cannot be imposed. Therefore the federal tax sought to be imposed upon a "governmental" activity of the State of Georgia is a burden and unconstitutional.

CONCLUSION.

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ROY H. BEELER,
Attorney-General of Tennessee.

NAT TIPTON,
Assistant Attorney-General of Tennessee.

HENRY B. WITHAM,
Counsel, University of Tennessee.

BLANK

PAGE

BLANK

PAGE

FILE COPY

FILED

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 882

MARION H. ALLEN, Collector,

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS AMICI CURIAE

WILLIAM S. ERVIN,
Attorney General of the State of Minnesota.
JOHN H. MITCHELL,
Attorney General of the State of Iowa.
GASTON L. PORTERIE,
Attorney General of the State of Louisiana.
RICHARD C. HUNTER,
Attorney General of the State of Nebraska.
HENRY H. FOSTER,
Attorney for the Board of Regents, University of Nebraska.
OSCAR S. LOOMIS,
Attorney General of the State of Wisconsin.

RAYMOND W. STARR,
Attorney General of the State of Michigan.
CLARENCE V. BECK,
Attorney General of the State of Kansas.
ROY McKITTRICK,
Attorney General of the State of Missouri.
A. A. F. SEAWELL,
Attorney General of the State of North Carolina.
ALVIN C. STRUTZ,
Attorney General of the State of North Dakota.
HERBERT S. DUFFY,
Attorney General of the State of Ohio.

BLANK

PAGE

INDEX.

	Page.
MOTION FOR LEAVE TO FILE A BRIEF.....	iii
BRIEF	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	2
POINT I. The immunity of State Governmental Functions from Federal Taxation	3
POINT II. The Governmental Character of Inter-Collegiate Athletic Contests	4
POINT III. The Tax Imposes a Direct Burden upon a State Governmental Activity	11
CONCLUSION	21
APPENDIX	22

CITATIONS

CASES

Ambrosini v. U. S., 187 U. S. 1.....	14
Brush v. Commissioner of Internal Revenue, 300 U. S. 352; 57 S. Ct. 495 .....4, 8, 9	
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.....	20
German Gymnastic Assn. v. City of Louisville, 117 Ky. 958; 80 S. W. 201	7
Gillespie v. Oklahoma, 257 U. S. 501	20
Helvering v. Mountain Producers Corp. ... U. S. ..., 58 S. Ct. 623 .....3, 19, 20	
Hoskins v. Commissioner, 84 Fed. (2d) 627.....	10
Indian Motocycle Co. v. U. S., 283 U. S. 570.....12, 15	
James v. Dravo Contracting Co., 58 S. Ct. 208.....	19
McCulloch v. Maryland, 4 Wheat. 316	3, 14

Mokovitch v. Independent School Dist., No. 22, of Virginia, 177 Minn. 446; 225 N. W. 292 7
Metcalf & Eddy v. Mitchell, 269 U. S. 514 ..... 3, 15, 19
N. Y. ex rel. Rogers v. Graves, 299 U. S. 401; 57 S. Ct. 269 ..... 8, 11
Panhandle Oil Co. v. Miss., 277 U. S. 218 ..... 12, 15, 16, 17
People v. Pommerening, 250 Mich. 391; 230 N. W. 194. 7
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429 ... 12
South Carolina v. U. S., 199 U. S. 437 14
Spencer v. School Dist. No. 1, 121 Ore. 511; 254 Pac. 357 6
State ex rel. School District v. Superior Court, 69 Wash. 189; 124 P. 484 7
U. S. v. B. & O. R. Co., 17 Wall. 322 18
U. S. v. King County, 281 Fed. 686 ..... 13, 15
Western Union Tel. Co. v. Texas, 105 U. S. 460 15
Weston v. Charleston, 2 Peters 449 19
Williams v. City of Talladega, 226 U. S. 404 15

ORDINANCE OF 1787

The Ordinance of 1787, Article III 4

ARTICLE

Michigan Law Review, Feb. 1938, Vol. 36, Pages 627-641 5

STATUTES

Revenue Act of 1926, Chap. 27, 44 Stat. 9, Sec. 500 ..2, 18, 22
Revenue Act of 1932, Chap. 209, 47 Stat. 169, Sec. 711 ..... 2, 18, 22

REGULATIONS

Treasury Regulations 43, Article 24 ..... 13, 14

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 882

MARION H. ALLEN, Collector,

Petitioner,

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE.

To the Honorable the Supreme Court of the United States:

Now come the undersigned, Sovereign States of the United States, by their respective Attorneys General, and move this Honorable Court for permission to file a brief, amici curiae, in support of the position of the Respondent, the Regents of the University System of Georgia, contesting the validity of the Federal Excise Tax sought to be imposed by the Government upon admissions to inter-collegiate athletic contests charged by the University of Georgia and the Georgia School of Technology, agencies of the State of Georgia, in carrying into effect their educational programs and activities.

Your Amici consider it fundamental that the Federal Government cannot interfere with nor burden the States or their agencies in the exercise of their governmental powers and duties.

Your Amici urge the importance of the decision in this case, not only to the State of Georgia, but to almost every state in the union. Each of your Amici have interests which will be affected by the decision of the Court herein. There are no powers or duties of more importance than the mental and physical education of the youth of our nation.

WHEREFORE, the States of Minnesota, Michigan, Iowa, Kansas, Louisiana, Missouri, Nebraska, North Carolina, North Dakota, Wisconsin and Ohio pray that this Honorable Court will accept the following brief for consideration.

Dated: April, 1938.

WILLIAM S. ERVIN,
Attorney General of the
State of Minnesota.

JOHN H. MITCHELL,
Attorney General of the
State of Iowa.

RAYMOND W. STARR,
Attorney General of the
State of Michigan.

CLARENCE V. BECK,
Attorney General of the
State of Kansas.

GASTON L. PORTERIE,
Attorney General of the
State of Louisiana.

ROY McKITTRICK,
Attorney General of the
State of Missouri.

RICHARD C. HUNTER,
Attorney General of the
State of Nebraska.

HENRY H. FOSTER,
Attorney for the Board of Regents,
University of Nebraska.

A. A. F. SEAWELL,
Attorney General of the
State of North Carolina.

ALVIN C. STRUTZ,
Attorney General of the
State of North Dakota.

ORLAND S. LOOMIS,
Attorney General of the
State of Wisconsin.

HERBERT S. DUFFY,
Attorney General of the
State of Ohio.

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 882.

MARION H. ALLEN, Collector,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS AMICI CURIAE.

INTRODUCTION.

In this case the Regents of the University System of Georgia are contending that the imposition of the federal tax on admissions is an unconstitutional interference with the governmental functions of the State of Georgia in so far as it is sought to impose it upon admissions charged by the University of Georgia and the Georgia School of Technology to inter-collegiate athletic contests conducted at such schools under the authority of said Regents in carrying into effect the educational policies of the State of Georgia. Your amici are states operating universities and colleges that engage in the conduct of similar inter-collegiate athletic contests as an integral part of their educational programs and activities. The Commissioner of Internal Revenue has imposed the

same tax upon their activities of that character. Judicial and administrative proceedings are pending involving the taxes imposed upon some of your amici. Each of your amici is interested in a proper determination of the issue involved in the instant case because of its effect upon its own conduct of its educational functions.

SUMMARY OF ARGUMENT.

I. The United States may not hamper or interfere with the performance by a State or its instrumentalities of their governmental functions by imposing a direct burden upon their operations through the taxation of their performance of those functions.

II. Each of your amici owns and operates a university or college in carrying out its educational policies. Each of said universities or colleges includes a department of physical education as an integral part of the educational services rendered to the people of each of them through such university or college. Each of them engages in inter-collegiate athletic contests as an integral part of a system of physical education provided as an integral part of the educational program of the state, operated through such university or college. The conduct of such inter-collegiate athletic contests is, under those circumstances, a performance of a governmental function of the State owning and operating such university or college.

III. The imposition of the federal admissions tax on admissions to such inter-collegiate athletic contests imposes a direct burden upon the performance of the governmental function which each of your amici perform through the instrumentality of such university or college.

POINT I.

THE IMMUNITY OF STATE GOVERNMENTAL FUNCTIONS FROM FEDERAL TAXATION.

The general principle derived from the necessity of our dual system of government is that neither government may so exercise its taxing power as to directly burden or impair the effective functioning of the other within its allotted sphere. This principle was first announced in the historical case of McCulloch v. Maryland, 4 Wheat. 316, and it has never been deviated from since that time. This Court has frequently applied this principle to protect the Federal Government against the exertion of a State's taxing power and to protect a state government against the exertion of the Federal taxing power. The general test employed to determine whether the one government has exceeded its power and trenched upon those of the other, is that a tax by the one is invalid if its effect upon a governmental function of the other is immediate and direct, and valid only if its effect thereon is remote and indirect; Metcalf & Eddy v. Mitchell, 269 U. S. 514. This principle was specifically reaffirmed in the very recent case of Helvering v. Mountain Producers Corporation, 58 S. Ct. 623. The tests of directness and remoteness have varied from case to case, but have invariably taken account of the character of the activity on which the burden rests and of the desire not to extend the immunity to bring within its scope activities of the type traditionally associated with private enterprise. It is by reference to the tests evolved in previous decisions that the character of the burden in the new case must be determined. This matter will be considered in Point III of the Brief.

POINT II.

THE GOVERNMENTAL CHARACTER OF INTER-COLLEGIATE ATHLETIC CONTESTS.

The maintenance and operation of the universities and colleges by a state are the performance by such state of an essential governmental function. This is recognized by the provisions of an oft-quoted section of Article III of The Ordinance of 1787 that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." It is immaterial whether they have a constitutional status as in some of the states such as Minnesota and some of the others, or are the creatures of statute as in Iowa and others. This court itself has recognized that to be the case. Brush v. Commissioner of Internal Revenue, 300 U. S. 352; 57 S. Ct. 495. It lies within each state to determine the extent and character of the branches of learning and the arts that it will promote through its institutions of higher learning. Physical education has long been considered a proper branch of training at the higher levels afforded by the universities and colleges. The incorporation of the inter-collegiate athletic contests as an integral part of the educational activities of physical education departments has become common practice in all of our institutions of higher learning whether maintained by the United States, the States, or by private endowment. This widespread practice constitutes irrefutable evidence that they constitute an appropriate activity for the proper execution of a general educational policy that aims to achieve the ideal of a sound mind in a sound body. The question therefore is whether modern physical education and athletic activities of that

character have been properly added to the old traditional educational programs of such institutions so as to entitle them to the same immunity from federal interference that belongs to those older traditional activities.

The proper solution of this problem requires a consideration of the position of inter-collegiate athletics. An excellent presentation hereof is found in a recent Note by Professor Ralph W. Aigler of the Law School of the University of Michigan, appearing in the February, 1938, issue of the Michigan Law Review, Volume 36, pages 627 to 641. Professor Aigler states in substance as follows: "To many people of the street football constitutes inter-collegiate athletics. Another common assumption is that the football activities in crowds of a rather small group of athletically prominent institutions are fairly representative of football in the hundred of universities and colleges whose doings are chronicled briefly, if at all, in the press. In truth, football at most institutions is only one of anywhere from five to fifteen inter-collegiate sports, all or nearly all of which, with perhaps the one exception, are probably conducted at a financial loss, so far as gate receipts are concerned." Even at those institutions with conspicuously large football income, "it is commonly true that the profit in that sport is insufficient to carry the deficits in their other athletic activities." In most, it is probably true that the educational programs, including inter-collegiate athletics, are required to be financed by funds derived from other sources than gate receipts. Among the sources from which the supplemental revenues are derived are state taxes in the case of state institutions. Such facts, as well as the known facts of the historical development of inter-collegiate athletics in the United States, negative any view that the universities and colleges have inaug-

urated and continued to carry on inter-collegiate athletics for the purpose of providing entertainment for the general public, or with an intention to invade the field of private business. The recent development of professional football shows that the private amusement business is rather tending to invade the field formerly reserved for the universities and colleges. The universities and colleges clearly cannot be shown to have taken up and developed inter-collegiate athletics for the purposes of making money by providing public entertainment. It is quite clear from the widespread progress of inter-collegiate athletics developed during the last fifty years, that the responsible public officials charged with administering the educational programs of the states have deemed such programs worthy of inclusion in their state's educational programs and so far as we are aware, no taxpayer has even seen fit to question that the use of public funds to provide facilities therefor has constituted an illegal waste or use of public funds.

The state courts have had occasion to consider the issue whether physical education and athletics were properly to be viewed as governmental functions when conducted by instrumentalities of the state. In an Oregon case, an action for personal injuries was based upon the negligence of a School District in placing a radiator in a gymnasium used in connection with the school. Under the Oregon legislation the District was not liable if it was engaged in a governmental activity and it was held that there was no liability in this case; Spencer v. School District No. 1, 121 Ore. 511, 254 Pac. 357. In a Minnesota case an action was brought against the School District for injuries suffered by plaintiff, a member of the football team of the school operated by defendant. The plaintiff was injured while playing

in a football game by unslaked lime placed on the gridiron by defendant. It was held that there was no liability because the defendant was engaged in a governmental activity; Mokovich v. Independent School District No. 22, 177 Minn. 446, 225 N. W. 292. In a Washington case it was held that a School District could use its power of eminent domain to acquire land for play-grounds which might be used for the common athletic games current among schools of its class; State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484. In a Michigan case it was decided that the University of Michigan could condemn land for a golf course; People v. Pommerening, 250 Mich. 391, 230 N. W. 194. In a Kentucky decision, German Gymnastic Assn. v. City of Louisville, 117 Ky. 958, 80 S. W. 201, exempting a gymnastic association from taxation as an educational institution, the court said:

> "Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education."

These decisions bear judicial witness to the soundness and propriety of the actions of the boards entrusted by the states with the promotion of their educational policies that physical education and inter-collegiate athletics as an integral part thereof are proper governmental functions of the states.

This Court, during its last term, discussed the question of what were governmental functions of one government immune from taxation by the other in two important cases. In the first of these, New York ex rel. Rogers v. Graves, 57 S. Ct. 269, 299 U. S. 401, it held invalid the imposition by New York of an income tax upon the salary received by the general counsel of the Panama Railroad Company, a New York Corporation, whose stock had been acquired and was then owned by the United States. In answer to objections that the corporation was engaged in activities which would have clearly constituted the conduct of ordinary private buisness, the Court took the position that this did not affect the governmental character of the railroad corporation because of its use in connection with the Panama Canal. It is a fair inference from this case that an activity which, considered alone, might be non-governmental, may be governmental when an integral part of a large enterprise that is admittedly of a governmental character.

Another case decided at the last term of this Court is that of Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495, in which the salary of the chief engineer of the New York City Bureau of Water Supply was held immune from federal income tax. It was there decided that the operation of such water supply system was the conduct of an essential governmental function of the state. It was stated that for a city such as New York the provision of an adequate water supply was a vital necessity and that there existed an important public interest in the conservation and distribution of water. The conclusion that the acquisition and distribution of a supply of water for the needs of a modern city involve the exercise of an essential governmental function was fortified by consideration of the pub-

c uses to which some of such water is put, such as sewers, treet sprinklers and supplying schools. This Court announced the principle that an activity which is a "necessary uxiliary" to the performance of admitted governmental unctions would itself share in and partake of the nature of hose functions and be itself governmental in character. his Court expressly rejected the view that a particular ctivity is non-governmental merely because it has been and ay be rendered by private enterprises, and the view that he fact that a charge is made for the services rendered by uch activity defeats its governmental character. In reference to the latter it stated:

> "The state or the city may exact a tuition charge for instruction in the public schools; but thereby the maintenance of the public schools does not cease to be a function of the government."

his case, therefore, supports the principle that a particular ctivity which is a reasonable and necessary auxiliary to the erformance of an admitted governmental function itself ecomes, by virtue of its relation thereto, a governmental unction. The activity of state universities on which the ax involved in the instant case is imposed is both a reasonble and necessary incident to their educational functions, nd a necessary auxiliary to the performance by them of heir educational functions, since no one would now deny he importance of physical training and education, and the raining of teachers in those branches, to be a proper part f a properly balanced educational system at collegiate evels.

The principles just discussed are supported by a consideration of the following case involving various aspects of tate educational activities in their relation to the federal

taxing power. In Hoskins v. Commissioner of Internal Revenue, 84 F. (2d) 627, the United States sought to tax the salary of the superintendent in charge of the operation of cafeterias in connection with a public school system. The theory of the United States was that the operation of those cafeterias was not a proper governmental function and that the superintendent's salary therefore was not immune from federal taxation. The court held it to be immune, and among other things stated:

> "We consider that the operation of the cafeteria system was a proper exercise of a governmental function by the school district and that Mrs. Hoskins is a public employee of a political subdivision of the State of Texas engaged in performing governmental functions."

The cases considered in this part show that the conduct of inter-collegiate athletics by the educational instrumentalities of a state have been held governmental activities in connection with various problems. The reasoning by which that position has been maintained requires a conclusion that they are governmental activities for purposes of defining the scope of the immunity of state activities from federal taxation. Reason confirms the soundness of the judgments of the state and federal courts that have passed on this matter and of the application of the same view to the problem involved in the instant case. It is highly erroneous to determine the issue on the assumption of divorcing inter-collegiate athletic contests from the educational program of which they are a part. So viewed, it is easy to argue that their function and purpose are those of public entertainment. The real issue, however, is whether such contests conducted by state universities and colleges as an integral part of a state's educational program are entitled to the

immunity shared by other state governmental activities. Viewed in their proper setting, the argument that their purpose is to provide the public with entertainment ceases to have even the merit of specious plausibility. Such a point of view would be as invalid as that rejected by this Court in Rogers v. Graves when counsel sought to deny the Panama Railroad Company its lawful claim to immunity merely because the operation of a railroad is a business enterprise. This Court in that case rightly insisted that the operation of a railroad as an integral part of the maintenance and operation of the Panama Canal was not such, however much it might have been such if not operated as an integral part of that large governmental activity.

POINT III.

THE TAX IMPOSES A DIRECT BURDEN UPON A STATE GOVERNMENTAL ACTIVITY.

The validity of the tax thus depends upon whether the burden that it imposes upon the conduct of a state's educational activity is direct or remote. The most important method for determining whether this tax imposes an immediate and direct burden upon such educational activities of a state, is to measure those effects by the tests of directness and immediacy that have been evolved by this Court in its long dealing with this subject matter. The tax in question is on either the entire transaction between a university and the purchaser, or on its act of selling the admission, or on the purchaser's act of purchasing the right to admission. It is immaterial on which particular one of these subjects the tax is imposed. The fact that the statute requires the tax to be paid by the purchaser of the ticket does not mean that

in law the effect on the university in the performance of its governmental function is not immediate and direct. A federal tax on the interest of a state bond is a tax paid by the recipient of the interest, but that has never prevented it from being held to be a direct and an immediate burden upon the state's power to borrow; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429. The tax imposed by the state of Mississippi which was held invalid by this Court in Panhandle Oil Co. v. Miss., 277 U. S. 218, was not imposed upon the United States as a purchaser of oil but was imposed upon and paid by the seller for the right to engage in the business of distributing oil and its products. In that case this Court stated:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests."

The same is equally true here where sale and purchase constitute the transaction on which the tax is based. The same principle was applied to protect the state against a federal tax on a vendor in Indian Motocycle Co. v. United States, 283 U. S. 570. In that case this Court stated:

> "The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle."

This principle of the unity of transactions is as applicable where the tax is imposed on the purchaser and required to be paid by him as it is where the tax is imposed upon and required to be paid by the vendor. This is clearly evidenced

by the case of U. S. v. King County, 281 Fed. 686. In that case a federal tax on transportation, which was required to be paid by the purchaser of the transportation, was held invalid under the principle involved in this case, because it imposed a direct burden upon the operation of a municipal ferry, a governmental function of King County, State of Washington. In that case the contention was specifically made that the fact that the tax was imposed on the purchaser prevented the operation of the principle protecting the states against federal taxation burdening their governmental functions. The Court answered the contention by saying:

> "It is true that in the present case the tax was not imposed directly upon the County of King, but upon the persons paying to it the transportation charges, but it is obvious that the collection of those charges is at least one of the means which the County must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state."

These cases warrant but one conclusion, viz., that the decisive fact is not the particular subject on which the tax is imposed or who is required by law to pay the tax, but its effect upon the governmental activities of the other government. The force and effect of these decisions can scarcely be deemed to have been negatived by the provisions of Treasury Regulations 43, Article 24:

> "Admissions by or for the benefit of Federal, State, or municipal governments. * * * The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a

> State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. The Act specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof."

The decisions of this Court are clearly to be preferred to administrative regulations that find no support in the law.

The effect of the tax in the instant case is immediate and direct as measured by legal standards, since it is on the very act which constitutes the performance, by a state, through its university, of its educational functions. This is borne out by such cases as the following. In McCulloch v. Maryland, already cited, the state tax was on the activity of the bank in its performance of one of the functions for the performance of which it had been created by Congress. In the cases cited in the preceding paragraphs the essential feature that made the tax invalid was the fact that it was on the very act which was a part of the performance by the affected governments of a part of their governmental functions. In Ambrosini v. U. S., 187 U. S. 1, this Court clearly intimated that a federal stamp tax on a bond required to be furnished by a liquor licensee as part of the regulation of the saloon business was an unconstitutional interference with the state's power to grant such license, since it was on an essential element in the performance by the state of its police power, although the tax in this case had to be paid by the licensee. The force of this case has been in no manner affected by that of South Carolina v. U. S., 199 U. S. 437, sustaining a federal license tax on a state's operation of a dispensary for the sale of intoxicants, since the issue therein was not whether the effect of the tax was direct or indirect

but whether the activity taxed was governmental or non-governmental. Measured by the legal standard developed by this Court, the effect of the tax involved in the instant case is clearly direct in its incidence upon the conduct by a state of its educational functions.

The effect of the tax in the instant case is also immediate and direct since it is on the formation of a contract incident to the performance by the state, through its university, of its educational functions. In Western Union Telegraph Co. v. Texas, 105 U. S. 460, a state tax upon each telegram sent from offices within the state was held invalid as applied to messages sent by the United States as imposing a tax on the means employed by the United States to carry out its constitutional powers although here, too, the tax was imposed upon the vendor and not upon the United States. A similar principle was applied in Williams v. City of Talladega, 226 U. S. 404. In Panhandle Oil Co. v. Miss. and Indian Motocycle Co. v. U. S., and U. S. v. King County, all heretofore cited, the tax was upon the formation of a contract entered into by the one government in the performance of its governmental functions, and the other contracting party was in each case a private person. There are no cases of which we are aware in which this Court has not found that the effect of a tax was immediate and direct when the tax was imposed upon a transaction to which the other government was a party, whether the transaction were the formation of a contract or a sale. The contract itself is one of those instrumentalities of such government with respect to which this Court said in Metcalf & Eddy v. Mitchell, supra, that "this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the

other." That case lists among such agencies or instrumentalities state officers, state bonds and the income therefrom. Those agencies are all said to be "so intimately connected with the necessary functions of government as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it." The tax in question in the instant case is in substance a tax imposed by the federal government upon the use by the state of the instrumentalities owned by it for the performance of its governmental functions of education.

This Court has at times measured the directness and immediacy of the effect of a tax, imposed by the one government on the activities of the other, by the factor whether the amount of the tax varied directly with the extent of the activities taxed. This factor was especially stressed in the case of Panhandle Oil Co. v. Miss., 270 U. S. 218, in which this Court stated on this matter:

> "The validity of the taxes claimed is to be determined by the practical effect or enforcement in respect of sales to the government. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede, and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. To use the number of gallons sold the United States as a measure of the privilege tax is in

> substance and legal effect to tax the sale. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

It was, therefore, held that the tax on the privilege of distributing gasoline measured by the number of gallons sold imposed a prohibited burden on the United States so far as the measure included gasoline sold to it for governmental purposes. It follows that if a tax is invalid under the principles now being considered when its measure merely is of such character that the amount of tax varies directly with the extent of the activity which it burdens, a fortiori, is a direct burden imposed when the tax is on the activity itself, and is of such character that the greater the amount of the activity the greater the contribution demanded of the state for the support of the federal government. Measured by this test the tax involved in this case does impose a direct and immediate burden upon a governmental function of the States.

The admissions tax involved in this case is a tax on the act of students, faculty, alumni and other persons in obtaining a license admitting them to the athletic contests conducted by a university as a part of a state's educational activity, and is a tax upon the university's grant of that license. The state's act of granting admissions to its property is the instrumentality through which it exercises, through its university, its governmental function of education. The tax in question is in substance a tax on the exercise of that power. The state does not derive its power to act through that instrumentality, and to enter into these transactions with a private citizen, from the United States. In Panhandle Oil Company v. Miss., already cited and discussed herein, this Court stressed the fact that the right of

the United States to purchase gasoline for the operation of its instrumentalities was not derived from the state nor dependent upon the state laws, but resulted from the authority of the national government to choose its own means and source of supply. The state has the same freedom to choose its own means for carrying out what it conceives to be, and has decided to be, the kind of educational policy that it wishes to promote. It does not derive that right from the United States but it is inherent in its existence as a state in this federal union. The tax in question is in substance an attempt by the United States to determine the proper scope of the state's educational policy. This is beyond its power. It could not do so directly nor may it do so by indirection through pressure resulting from taxing the state's activities in this field. It is not a situation in which the federal government can use an admitted power to curtail a state's act that conflicts with the exercise of such power as was true of the tax imposed on the circulation of state organized banks.

The tax in question is also one on the power of a university, a state agency, to receive income for granting others a license to temporarily use its property. It has been held that the United States cannot tax the dividends received by a municipality on stock acquired by it as part of a plan for subsidizing a railroad. The acquisition and holding of such stock was held to be the exercise of a governmental function from which the immunity of the income received thereon from federal taxation was deduced. U. S. v. B. & O. R. Co., 17 Wall. 322. This Court has also stated, in deciding that a state cannot tax federal bonds, that "the right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible

influence on the contract." Weston v. Charleston, 2 Peters 449. In a substantial sense the admission tax is a tax on a contract of a university, when made, and operates upon its power to make such contracts before that is exercised and has a decided influence thereon. The tax is therefore within the condemnation of the principle stated in the case last cited.

There is nothing in the latest decisions of this court in any way denying the test of directness developed in the cases herein relied upon. In the case of James v. Dravo Contracting Company, 58 S. Ct. 208 this Court merely applied the principles of Metcalf & Eddy v. Mitchell, supra, to a new type of tax. The Dravo Contracting Company was held to be an independent contractor, a purely private enterprise. The admissions tax, even though in terms payable by the purchaser, is a tax on the activity of a state instrumentality and thus of the state itself, whereas the tax involved in the Dravo Contracting Company case was upon the emoluments received by a private enterprise from a contract with the federal government. The case contains no intimation that the state would have been permitted to tax the making of the contract between the United States and the Dravo Contracting Company. The most recent case is that of Helvering v. Mountain Producers Corporation, already cited, in which this Court sustained a federal income tax upon the net income of a private corporation exploiting the oil resources of state school lands under a lease derived from the state. Here, too, the immediate incidence of the tax was upon the private enterprise with respect to the profits from the conduct of a private business. In such case the effect upon the state's activity can occur only so far as the tax can be shifted backward to the state as lessor. The complexities

involved in the shifting of taxes is such that there was a high probability that the private lessee might absorb the tax or shift it in part to the consumer. In any case the tax was not on the state's activity in executing the lease under which the private lessee derived his net income. This Court, while overruling the Gillespie and Coronado cases, stated with respect to those two cases as follows:

> "In the light of the expanding needs of state and nation, the inquiry has been pressed whether this conclusion (that the taxes in the Gillespie and Coronado cases hampered the government in executing their policies) has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest but is imposed upon the gains of the lessee, like that made upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

It was held that the taxation of the lessee's income did not directly hamper the efforts of the lessor government in carrying on its policy in making leases. There is, however, no single intimation that this Court intended to overrule the cases in which it has held invalid the taxation by the one government of the contract or the making of the contract of the other. That is the issue presented by the admissions tax as applied to the inter-collegiate athletic contests conducted by state owned and operated universities and colleges. There is, therefore, no basis for affirming that the Mountain Producers Corporation case requires any conclusion other than that the conduct of such inter-collegiate contests is immune from taxation by the United States.

CONCLUSION.

It follows from the argument set forth in the preceding pages that state universities and colleges, in conducting inter-collegiate athletic contests as an integral part of the system of physical education as part of a general educational program, are engaged in the performance of a governmental activity of the state. The federal tax on admissions to such contests is a tax on the contract and the making of the contract between a state instrumentality and those with whom it contracts. The burden of such tax on a state's activities consisting of the making of such contracts and the conduct of such contests is a direct and immediate burden by all of the tests heretofore developed by this Court for the determination of such issue. It is, therefore, a tax that imposes a direct burden on the performance by the states of an important part of their governmental functions. It is, therefore, invalid and in violation of the immunity that such state activities and functions possess from such burdens.

Respectfully submitted,

WILLIAM S. ERVIN,
Attorney General of the
State of Minnesota.
JOHN H. MITCHELL,
Attorney General of the
State of Iowa.
RAYMOND W. STARR,
Attorney General of the
State of Michigan.
CLARENCE V. BECK,
Attorney General of the
State of Kansas.
GASTON L. PORTERIE,
Attorney General of the
State of Louisiana.
ROY McKITTRICK,
Attorney General of the
State of Missouri.

RICHARD C. HUNTER,
Attorney General of the
State of Nebraska.
HENRY H. FOSTER,
Attorney for the Board of Regents,
University of Nebraska.
A. A. F. SEAWELL,
Attorney General of the
State of North Carolina.
ALVIN C. STRUTZ,
Attorney General of the
State of North Dakota.
ORLAND S. LOOMIS,
Attorney General of the
State of Wisconsin.
HERBERT S. DUFFY,
Attorney General of the
State of Ohio.

April, 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 500

(b) No tax shall be levied under this title in respect of—

(1) Any admissions all the proceeds of which inure (A) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving-picture theater—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual; * * * (U. S. C., Title 26, Secs. 940-944.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 711. Admissions Tax.

(a) Paragraph (1) of section 500 (a) of the Revenue act of 1926, as amended, is amended to read as follows:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax

shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscribed for a single admission is less than 41 cents;"

* * * * *

(c) Section 500 of the Revenue Act of 1926, as amended, is amended by adding at the end thereof the following subdivision:

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States.)"

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S
FILED
APR 25 1938
CHARLES ELMORE CROPLEY
CLERK

No. 882

In the Supreme Court of the United States

OCTOBER TERM, 1937

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

OTTO KERNER
Attorney General of Illinois

SVEINBJORN JOHNSON
Special Assistant to the Attorney General

BLANK

PAGE

INDEX

	Page
Petition for Leave to File Brief as *Amicus Curiae*	1
Brief of *Amicus Curiae*	
Legal Propositions	2
Preliminary Statement of Principles	2
The Argument	
I. Conducting a University is a Governmental Function	5
II. The Public Competitive Athletic Contest is Properly a Part of the State's Educational Program	9
III. Decision of State Authorities That Public Athletic Contest is Proper Part of Educational Program, Presumptively Correct	16
IV. The Educational Value of the Public Competitive Athletic Contest	22
V. Some Points Concerning the Dissent in the Circuit Court of Appeals	28
VI. The Non-discriminatory Tax Doctrine	36
VII. The Tax is a Direct Burden on the State of Georgia	43
VIII. A Substantial Burden is Laid upon the State of Georgia without Its Consent	45
Appendix	
A. Regulations of the Commissioner of Education Governing Health and Physical Education, Approved by the Regents of The University of the State of New York, Journal of Meeting of the Regents, June 30, 1937	47
B. Cardinal Principles of Secondary Education, Department of Interior, Bureau of Education, Bulletin, 1918, No. 35	50
C. The Educational Implications of Intercollegiate Football, H. O. Crisler, Research Quarterly of the American Physical Education Association, Vol. IV, No. 1, March 1933	51
D. General Primary Objectives, Intercollegiate Sport in Western Conference, Athletic Journal, Vol. VII, No. 10, P. 1, June 1, 1927	53
E. Rules, Regulations and Opinions of the Intercollegiate Conference of Faculty Representatives, Revised 1937	56

CITATIONS

Cases: Page

Austin v. Alderman, 7 Wall. 694 ... 3
Bartels v. State of Iowa, 262 U. S. 404 ... 35
Brush v. Commissioner, 300 U. S. 352 ... 3, 5, 8, 9, 33
Clallam Co. v. United States Spruce Corp., 263 U. S. 344 ... 3
Collector v. Day, 11 Wall. 113 ... 3, 41, 42, 46
Commissioner v. Ten Eyck, 76 Fed. (2d) 515 ... 33
Coronado Oil and Gas Co. v. Burnet, 50 Fed. (2d) 998 ... 6
Green v. Frazier, 253 U. S. 233 ... 18–20
Helvering v. Mountain Producers Corp., U. S., 58 S. Ct. 623 ... 4, 5, 38
Helvering v. Powers, 293 U. S. 214 ... 4, 20, 21
Hoskins v. Commissioner, 84 Fed. (2d) 627 ... 18
James v. Dravo Contracting Co., U. S., 58 S. Ct. 208 ... 42
Kentucky v. Dennison, 24 How. 66 ... 45
Lloyd v. City of New York, 5 N. Y. 369 ... 4
McCulloch v. Maryland, 4 Wheat. 316 ... 41, 42
Noble State Bank v. Haskell, 219 U. S. 104 ... 20
Railroad Co. v. Peniston, 18 Wall. 5 ... 46
South Carolina v. United States, 197 U. S. 437 ... 3
United States v. California, 297 U. S. 175 ... 3, 8, 9

Statutes:

Revenue Act of 1926, Sec. 500, 44 Stat. 91 ... 1, 2
Revenue Act of 1932, Sec. 711, 47 Stat. 271 ... 1, 2

Miscellaneous:

Athletic Journal, Vol. VII, No. 10 ... 24, 29
Chicago Tribune, January 9, 1923 ... 14–16
Clews, E. W., Educational Legislation and Administration of the Colonial Government ... 6
Department of Interior, Bureau of Education, Bulletin 1918, No. 35 ... 22, 26
Farrand, Records of the Federal Convention, Vol. III ... 7
Griffith, John L., The Big Ten Book of Athletic Events ... 13
Illinois Agriculturist, November 1909 ... 10
Journal of Meeting of Regents of The University of the State of New York, June 30, 1937 ... 22, 29
Minutes, Board of Trustees, University of Illinois, 1928 ... 13
Nevins, Allan, Illinois ... 11
Physical Education and Athletics for Men, University of Minnesota, 1937-38 ... 28
Research Quarterly of the American Physical Education Association, Vol. IV, No. 1 ... 26, 29
Research Quarterly of the American Physical Education Association, Vol. IV, No. 2 ... 23–24, 29
Rules, Regulations and Opinions of the Intercollegiate Conference of Faculty Representatives ... 14, 25, 29
Sixteen Years at the University of Illinois, 1904-1920 ... 14
Topeka Daily Capital, December 15, 1924 ... 12

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The decision in this case is bound to be of the utmost importance to the State of Illinois, and to every state-owned and operated college or university in the land. If it be held that the admission taxes, authorized under Section 500 of the Revenue Act of 1926, as amended by section 711 of the Revenue Act of 1932, must be collected by the University of Illinois, that institution, and, through it, the State, will be subjected to a burden, both direct and substantial.

The Attorney General of the State of Illinois, therefore, respectfully petitions that the accompanying brief be filed in this cause in his behalf as *amicus curiae*.

OTTO KERNER
Attorney General of Illinois
SVEINBJORN JOHNSON
Special Assistant to the Attorney General

BRIEF OF AMICUS CURIAE

LEGAL PROPOSITIONS

Amicus curiae will, in this brief, concern himself chiefly with two propositions: *first,* the public competitive athletic contest, such as a football or a baseball game, is a proper part of the educational program of the State of Georgia, and is, therefore, a governmental function when all the circumstances of the instant case are considered; and *second,* Congress is without power to lay upon any State governmental agency the substantial burden of collecting the admission taxes described in Sec. 500 of the Revenue Act of 1926, as amended by Sec. 711 of the Revenue Act of 1932.

Amicus curiae also contends that education through a State university is a governmental function, and *assumes* that the University System of Georgia is a governmental agency of that State.

PRELIMINARY STATEMENT OF PRINCIPLES

As ground work for the main argument, it seems advisable to state certain principles so generally accepted that no extended reference to adjudicated cases is necessary. This Court has heretofore held that:

1.

There is no power in the national government to tax, or impose direct burdens upon, or embarrass such instrumentalities or agencies of the States as are used in the performance of strictly governmental

functions. That a like prohibition as against the States and in favor of the Federal Government exists has become a truism. Collector v. Day, 11 Wall. 113, 124; Brush v. Commissioner, 300 U.S. 352; and the principle is not affected by the *amount* or *quantity* of the burden. United States v. California, 297 U.S. 175;

a. This prohibition is none the less efficacious because implicit, rather than expressly stated, in the federal Constitution; for that which is implied is as much a part of the instrument as that which is expressed. South Carolina v. United States, 199 U.S. 437; Collector v. Day, supra; Clallam Co. v. United States Sprtice Corp., 263 U.S. 344;

b. The taxing power of the national government, in so far as there has been a grant of such power, is without limit; it may be exercised in such a manner as to "embarrass and destroy" the subject-matter of the tax, and the courts are powerless to give redress for that reason alone. Austin v. Alderman, 7 Wall. 694. This grant of power, nevertheless, like every other power granted the national government under the Constitution, is subject to the implied limits stated under 1, and 1, a and b, supra.

> "The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Clallam Co. v. United States Spruce Corp., supra; and

c. The doctrine of tax immunity has been admitted and enforced as essential to the preservation of our dual system of government. Helvering v. Powers, 293 U.S. 214. Unless this political principle is to be abrogated by judicial decree, there can be no further extension of the rule applied in Helvering v. Mountain Producers Corp.,____ U.S.____, 58 S. Ct. 623.

2.

The University System of Georgia is, in the aggregate, an instrumentality of the State created for the more effective execution of a strictly governmental function (of providing the means of higher education for the people of the State), and all property and income received, used for the purpose of administering the System is beyond the direct, as distinguished from remote and incidental, exertion of the federal taxing power, to any extent or in any degree.

3.

The distinction between governmental and proprietary functions has become a basic doctrine in at least two important branches of the law, namely, tort liability and tax immunity of governmental agencies. One of the first cases in which the concept was applied is Lloyd v. City of New York, 5 N.Y. 369 (1851). At page 374, the Court said public corporations possess two kinds of powers:

> "* * * one governmental and public, and to the extent that they are held and exercised, is

clothed with sovereignty—the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal corporation, and while in the exercise of the latter, is a corporate, legal individual."

This Court, in South Carolina v. United States, supra, invoked the formula and held that an agent of the State, in conducting a liquor dispensary system, was performing a proprietary rather than a governmental function and was, accordingly, subject to the federal excise laws. It was also applied in Brush v. Commissioner, supra (1937).

4.

This brief is written upon the theory that the distinction, pointed out under 3, supra, between governmental and proprietary functions of the States, expressly applied in the cases above described and by necessary implication in Helvering v. Mountain Producers Corp., supra, is still valid in this Court. *If this doctrine is to be abandoned, the schools should be the last, not the first, to feel the full impact of the blow.*

THE ARGUMENT

I

Conducting a University is a Governmental Function

That education is a governmental function is no longer seriously debatable. It is assumed without dis-

cussion in Coronado Oil Co. v. Burnet, 50 Fed. (2d) 998.

Attention is called to a volume by E. W. Clews, entitled Educational Legislation and Administration of the Colonial Government, an authoritative historical work. Without going into detail, we are told that the Massachusetts Colony, fully one hundred years before the Constitution was adopted, expended public funds for the promotion of higher education; that in Connecticut, as early as 1715, public property and funds were appropriated for the advancement of college education; in New Hampshire, in 1693, and again in 1719, provision was made for the support of education through public taxation; and in Rhode Island, on February 17, 1764, the Legislature passed an act for the incorporation of the schools, in which it was averred, among other things, "Every wise and well regulated state" gives attention to the spread of knowledge among the people. This act pertained to *higher education*, as well as to the primary subjects. In New York, in 1764, Kings College was founded by a public act. In 1740 the City of Philadelphia appropriated twelve hundred pounds, and one thousand pounds annually for a period of five years, for the support of an academy. In New York State likewise, as early as 1737, public funds were appropriated for the teaching of Latin, Greek, etc.

It thus appears that higher education was supported by general taxation in some colonies more than a century before the Constitution was adopted, a fact

fully appreciated by the gentlemen who framed that instrument in Philadelphia in 1787.

It is improbable that a single leader of the movement for independence, or a single framer of the federal Constitution, did not believe firmly in the imperative necessity, not only of widespread popular education, as afforded by the common schools, so-called, but in the need for seminaries, colleges and universities operated by the State at public expense for the dissemination of knowledge in the higher branches. The federal Constitution is silent on the subject of a National university and upon the subject of education from no want of appreciation of its importance; the framers of that instrument came from States which had taken steps to maintain a school system at public expense, and they rejected the proposal to found a National University, for the reason, as pointed out by Roger Sherman in a debate in Congress later (Farrand, Proc. Const. Convention, Vol. III, Appendix A, CCLV, p. 362), that it was deemed to be the peculiar concern of the States. At the time of the adoption of the instrument the States had taken definite steps in the direction of promoting popular and college education at public expense. *The power was consciously reserved by the States.* The conducting of a school is an old governmental function, and in order to equip young men most fully for life and its work, it has recently become necessary to carry on this new activity—the football game—in order to perform the function fully. This seems good

sense and good law. Any other rule would deny the possibility of change or progress in the use of *means* or *methods* for the more adequate execution of traditional governmental powers. The conclusion seems to be inescapable that at the time of the adoption of the federal Constitution in 1787 the conviction was general that education was essentially an interest of the States and control thereof a governmental function.

In conclusion: Control over education was deliberately and consciously reserved to the States as a function of government and not granted Congress or the new nation. Applying the reasoning in United States v. California, supra, in respect of the control over commerce, this reservation by the States of control over education excludes the idea that the Federal Government can now challenge the right of the States to embrace higher education among their functions. Moreover, having reserved control over education, the States are free to adopt the programs and choose the means for making this power effective, and such programs and such means are *prima facie* governmental functions.

In Brush v. Commissioner, supra, the Supreme Court held that education through the elementary schools is clearly a governmental function. The court said:

> "Certainly, the maintenance of public schools * * * * calls for the exercise of governmental functions."

57 S. Ct. 500.

Under the doctrine recently announced by the Supreme Court in Brush v. Commissioner, supra, and United States v. California, supra, long and uninterrupted usage on the part of the States—in this instance antedating the Constitution—in embracing the operation of a university, for the imparting of knowledge in the higher branches of learning, within the sphere of governmental functions and to support the same by resort to the taxing power, removes from the domain of serious controversy the proposition that higher education is a function of the State government and is not proprietary in character.

> "Hence we look to the activities in which the States have traditionally engaged as marking the boundary of the restriction upon the federal taxing power."

United States v. California, supra, 56 S. Ct. 424.

II

The Public Competitive Athletic Contest is Properly a Part of the State's Educational Program

The attack in the instant case is directed against public competitive or intercollegiate athletic contests in general, and the football contest in particular, and it is claimed that these are not necessarily or reasonably a part of the educational program of a State university. From this premise it is reasoned that while education in the interests of health and calculated to develop the physical body, is properly a part of the educational program and, therefore, a func-

tion of government, the intercollegiate contest, especially the intercollegiate football game, is not and is rather a commercial or proprietary venture.

Against the narrow view of public competitive athletic contests we offer the testimony of the highest authorities in the field of physical education. These men speak out of years of experience and observation, while those who criticise intercollegiate athletic contests usually speak from theory. In the Illinois Agriculturist for November 1909 George A. Huff, late Director of Athletics at the University of Illinois, and in his time the most widely known and generally respected director of physical education in the country, said:

> "Much can be said from a physiological standpoint against the competitive side of athletics, but where one man may be induced to overdo in competition, hundreds of others develop that fighting grace, and that stick-to-it-iveness which they might never have attained, and which in after life has often proved the key to their success. I have watched men on the athletic field who were in all senses cowards, fearing fatigue or physical injuries, and I have seen them develop into fearless, aggressive and manly men, fit for the struggle of life * * * * "

Speaking of athletics at Illinois from the purely commercial standpoint, Mr. Huff continued:

> "Athletics at Illinois support themselves. The State gives no appropriation to sustain

athletics. They do not make money, for the Athletic Association is constantly putting into permanent improvements on Illinois Field all of its yearly surplus, if there is any* * * * *"

Such is the general history of athletic income throughout the country. Whatever receipts there may be from these contests are turned back into the treasuries of the State institutions, to be used by them for still further advancing the cause of education, physical, mental and moral.

In his book, Illinois, Allan Nevins, of Cornell University, New York, Oxford University Press, 1917, page 298 ff., says:

"To say that athletics receives a rare degree of attention does not mean that under the circumstances it takes an undue part of the student's time. The undergraduate, with little of the theatre, no excursions, no town dinners, and few concerts, naturally looks forward with eagerness to the football games or baseball matches that give him a regular Saturday afternoon thrill. The Homecoming and Interscholastic activities are centered in the football game and the baseball and track contests, respectively, and in these the presence of thousands of alumni and other visitors help to generate a wildly exciting interest * * * * But this interest in a half dozen baseball and as many football contests is thoroughly healthy, for it takes little time and it in no way militates against the general participation of students in athletic activities of their own

> * * * * The teams usually practice on Illinois Field, and the inexpert have the wide south campus to themselves. On fine days it is inspiring to see this stretch alive with class teams, fraternity teams, literary society and other club teams, and teams informally mustered * * * * In this connection it must be said that no students have for many years left without appreciation of the services to the whole institution of George Huff, not merely as efficient director of athletics, but as a man whose influence upon the moral standards of members of the University teams has been of the highest sort."

Mr. Huff regarded "the spectacular athletic victory" as a symbol of the general health and vitality of the student body. In the Topeka Daily Capital of December 15, 1924, the writer, speaking of George Huff, says,

> "That intercollegiate athletics today is not 'wagging the dog' was another of his statements. Mr. Huff believes all the energy used, all the money expended, worthwhile since in the development of major sports—which approach gate receipts approaching fabulous proportions—make possible the development of a program looking to the inclusion of every college student in intramural sports * * * * "

The fact is that the receipts from the competitive contests make possible intramural athletics, a sound and valuable educational asset in our schools.

It is obvious that to speak of the receipts from these

intercollegiate contests, such as football, basketball, track meets and the like, as "profit" in the usual business sense, is erroneous. The public, it is true, pays fees to witness these contests, but these fees are turned right back into the educational plant and devoted entirely to non-profit enterprises, namely, the physical or general education of students. In John L. Griffith's book, The Big Ten Book of Athletic Events, Chicago, C. B. Hopkins, 1929, p. 51 ff., we find the following typical statement concerning the use to which receipts are put:

> "A large part of the Illinois football profit is being used for the development of *intramural athletics.* More than $55,000 was recently expended for installing floors, walls and ceiling in the West Great Hall of the Memorial Stadium to make it available for intramural basketball, volleyball or handball courts. The Athletic Association will next erect an artificial ice skating rink at a cost of probably more than $300,000."

We may add that that has been done, and the ownership, control and operation of the skating rink is in the Board of Trustees of the University of Illinois, which, under the decisions of the Supreme Court of that State, holds title to all property for the people of the State of Illinois; and the State Auditor lists the same as property of the State. Minutes, Board of Trustees, University of Illinois, May 23, 1928, p. 614.

In Sixteen Years at the University of Illinois, 1904-

1920, University of Illinois Press, Urbana, p. 182 ff., we find the following statement among other things,

> "Intercollegiate competition is maintained with each of the other universities of the western conference * * * * It is the general belief at the University of Illinois that intercollegiate athletics can be maintained without interference with the intellectual interests of the general student body; while so far as the contestants themselves are concerned, whatever has been acquired in the way of physical prowess, moral training, finds its surest test in the intercollegiate game."

As early as 1895 the presidents of various midwestern universities met and drew up a series of rules which became the foundation of the present rules of the Big Ten Conference in the Middlewest, resulting in the total elimination of professionalism and the making of the teams representative of the student body. No man delinquent in his studies is permitted to play in these contests. Inasmuch as it is a signal honor to be a member of a competing intercollegiate team, this ambition to make the team is a constant stimulus to closer attention to studies and to better scholarship. This is wholly ignored by the dissenting judge in the Circuit Court of Appeals, and by those who attack the public competitive contest. See Appendix E.

In the Chicago Tribune, January 9, 1923, Hugh Fullerton said, among other things,

> "The full program of physical education, intercollegiate athletics, intramural athletics, and training of athletic coaches, proceeds as part of the plan of education of the boys and girls of the State."

It should be noted that a similar plan has been adopted in all the leading schools and colleges of the land. Intercollegiate or public competitive athletic contests are now and for years have been an integral and essential part of the entire program of athletic education in our higher institutions of learning.

The same author, Hugh Fullerton, in the Chicago Tribune, on January 9, 1923, writing with special reference to George Huff, said:

> "He believes in athletics, in intercollegiate contests, in football, if properly safeguarded—and in Illinois. Nor does he hold with the theory of the academic professors who oppose sport, especially football, but explains gently that our whole system of education is founded upon the Greeks, and that some of the academics are inclined to forget that the Greeks included athletics and sports in their educational scheme."

Again this author says in the same article,

> "I wish all the folk in Illinois could see what this school is doing for their sons and daughters. Anyone opposing athletics, objecting to football as 'foolish,' who visits Illinois and sees men and women being made sound, strong, and graceful, will change views. Incidentally,

> I was informed by several of the athletic department that they had never seen one faculty member ranking full professor, in the gym, save for big contests."

(We have been obliged, because of the very short time at our disposal, April 14-26, to make more extensive reference to Illinois than others, but the methods and attitudes are, as is commonly known, in all substantial respects identical in the universities and colleges of the country with respect to all matters material to the present inquiry. Of this the Court takes judicial notice because of the notoriety of the facts.)

III

Decision of State Authorities that Public Athletic Contest is Proper Part of Educational Program, Presumptively Correct

The dissenting judge seems to think that unless these "gladiatorial spectacles" (strangely, although the problem is general, reference is limited to football, though this is only *one* of *many kinds* of public games and contests sponsored by universities, far from "gladiatorial" in character, and to which admission is charged) " * * * * are an essential part of higher education" and the *Court*, rather than the State, so finds, and "as such governmental function" of Georgia, the enterprise of conducting a public game of football, baseball, basketball, a golf or tennis tournament, a hockey match, and the like, is proprietary and the principle of reciprocal immunity

from taxation of State or federal governmental instrumentalities is not applicable.

Two fundamentally erroneous assumptions support this view. *First:* it is not necessary to show that these contests are "an essential part of higher education"; it is enough that they appear, when reasonably and fairly viewed, appropriate parts of the *total* educational program, for, obviously, there is no *absolute* standard, known by man or revealed by God, by which to judge what is "essential" and what is merely reasonably appropriate and desirable. Some would regard Latin as essential, others as merely desirable, and still others as a waste of time. Judgments and opinions differ, but normally, of that difference of opinion this Court is not the arbiter. *Second:* the dissenting judge, able though he is, enunciates a dangerous fallacy, when he assumes that it is for the federal courts to decide, without regard to the local conditions or the decision of the local authorities, *what is* or *is not* an "essential part of higher education."

We believe the bar and the people of this country would be astonished were this Court to announce the bald doctrine that the agents designated by the State to frame educational curricula, are without power to set these up for their higher educational institutions, except subject to review and reversal by the federal courts in their uncontrolled or unlimited discretion. It seems plain that the most extreme doctrine which can be supported, in the light of prior decisions of this Court, is that while the *ultimate* power to decide

whether given activities in our schools are educational or proprietary, may be in the federal courts *when certain federal questions* are at issue, yet the decisions of the State authorities upon the question of what may be properly included in the curriculum, will be regarded as *prima facie* correct, and this Court is

> "not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated."

Green v. Frazier, 253 U.S. 233 (1920). See also Hoskins v. Commissioner, 84 Fed. (2d) 627. This principle *amicus curiae* regards of paramount importance.

In the case at bar the finding of the State authorities—including the courts of the State—that public competitive athletic events are a proper part of the State's educational program should not be disturbed by any court unless the conclusion be *clearly* unreasonable and *without substantial* support in *currently accepted educational theory or practice.*

We realize that the power of final decision as to immunity from federal taxation rests with this Court, but if, in order to decide that question, it becomes necessary to determine whether a given activity is properly, when fairly and reasonably viewed, a part of the *educational program* in a State owned and operated university, the decision of the *State* authorities upon that point is entitled to the highest respect, and in most cases would be controlling.

Otherwise, this Court substitutes its judgment, upon primarily non-judicial matters, for the judgment of specially trained persons chosen by the State for the purpose.

The principle is settled. In Green v. Frazier, supra, this Court laid down a rule of clear, sound and far-reaching implications. There the "New Day" (that is what it was called) program of the Non Partisan League was under attack. Various legislative acts involving the State in the business of building homes, operating banks, grist mills, creameries, etc., were challenged as contemplating the exercise of the taxing power for other than "public purposes" and, therefore, as taking the property of the citizen without due process of law. The people at a referendum, the legislature, and the Supreme Court of the State had concluded that these purposes were public, not private, and within the constitutional power of the people to support from the public revenues. This Court then states, in language above set forth, that the findings of the State and its agents upon these points of policy and judgment, will not be disturbed on appeal unless "beyond reasonable controversy" it appears that somebody's constitutional rights have been violated. In effect in this case, the United States claims its right and powers of taxation, granted it by the Constitution, have been violated because the State regards competitive athletic contests as proper parts of its educational program. On authority and principle, this conclusion of the State of Georgia comes clothed with

the highest presumption of correctness. In the case of Green v. Frazier, supra, this Court further and significantly said that

> "what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment * * * * "

How could this Court do otherwise? In forty-eight States conditions differ widely, and the local authorities are in a better position than this Court to "form a judgment" as to the proper content of the State's educational program. This Court said, in Noble State Bank v. Haskell, 219 U.S. 104:

> "In short, when the Oklahoma legislature declares by implication that free banking is a public danger * * * * this court certainly cannot say that it is wrong."

The dissent ignores the primary right and duty of the State to make these decisions respecting its own peculiar concerns; and the mere fact that the decision of the question in a particular way may, as a necessary legal incident, remove a certain activity from the field of federal taxation, does not affect the inherent right of the State to make such decision, when the activity represents a "usual governmental function." Helvering v. Powers, supra. For example, a *private* laboratory may be subject to a federal tax in a variety of ways, but if a State set it up in connection with its public health program, no one would

contend that the federal government could, under the decisions of this Court as they now stand, tax it in any form, merely because by going into this activity the indirect result is to remove something from the reach of the Federal taxing power. "Normally" every branch of public education is within the control of the State and is "not a departure from usual governmental functions." Helvering v. Powers, supra.

The sole question on this appeal is whether the decision of the authorities of the Georgia System to include public competitive athletic contests as a part of its higher educational program, is so clearly without support in sound or accepted educational theory or practice as to warrant a review with a contrary conclusion by this Court and a holding that the activities are indubitably proprietary and commercial rather than educational. This point was not considered by the dissenting judge.

It is the considered view of those who are responsible for planning educational programs for the University System of Georgia that the public competitive athletic contest is a proper part of the completed athletic educational process. It is possible to find differences of opinion upon this phase of the problem, but it certainly cannot be said to be clear "beyond controversy" that the inclusion of the contest is not proper. We have selected only one statement of policy in this behalf, but from the largest State and also one of the leading States in the field of education. The Regulations of the Regents of The University of

the State of New York on the subject are set forth in Appendix A. There the competitive athletic contest is recognized as a proper part of the State's program.

A volume could be written on the importance of athletics in the education of youth. Its importance is implicit in every sound definition of education. See Appendix B, the Seven Cardinal Principles of Education. All history shows that the culminating point in athletic training is some sort of public exhibition, or contest. From the most ancient times to the present, gymnastics have been regarded as a necessary part of education and at the great national festivals the chief attractions were contests in physical prowess.

IV

The Educational Value of the Public Competitive Athletic Contest

We refuse to be put on the defensive with respect to the merits of a part of the program of education in athletics commonly recognized in the best colleges and universities; and I regret the necessity of answering attacks upon a part of this program which emanate from sources obviously not fully informed about its essential character. We should hesitate to rest an argument in behalf of the football contest on nothing more authoritative than our own views, convinced though we are of its real educational and character-forming value. We are not left solely to speculation. Recently M. M. Thisted, Ph.D., made an extended study of the Relationship between Participation in

College Athletics and Vocational Success. The results of the survey are printed in the Research Quarterly of the American Physical Education Association, Vol. IV, No. 2, May 1933. Among the conclusions the following statements appear:

"2. Athletes and active alumni are found living in communities three times larger than those in which non-active alumni are living.

"3. There is a larger percentage of athletes with life insurance of $55,000 or above than there is of the other groups combined, although the median of all athletes is slightly less than that of the active group but greater than that of the non-active group. * * * *

"6. According to an arbitrary weighting scheme on number and make of car owned devised by the author, the athletic group has a higher success rating than either of the other groups. Of alumni whose scores on cars were seven or higher, ten were athletes, three were active, two were non-active.

"7. There is little difference between the median incomes of the three groups for the years 1925 to 1929. Of alumni graduating since 1920 the athletes are receiving today annual incomes considerably higher than either of the other groups. There appears also a tendency for a greater number of athletes to report incomes of 9,500 dollars or over than is true of non-athletes.

"8. The alumni who specialized in either basketball or football are now receiving larger

annual incomes than those specialized in track. * * * *

"10. There appears a positive relationship between the extent of participation in college athletics and financial success. * * * * "

Again, the author summarizes:

"The majority of educational, professional, and business leaders assign values to intercollegiate athletics. This estimate has been generally based on opinion alone."

For evidence bearing on the value of the intercollegiate contest, and the general aims of intercollegiate athletics, we refer to Appendix D of this brief. The Western Conference consists of the Athletic Directors of ten large mid-west universities (all State universities except two)—namely, Chicago, Illinois, Indiana, Iowa, Michigan, Minnesota, Northwestern, Ohio State, Purdue and Wisconsin.

Judge Hutcheson in his dissent refers to some practices in Georgia which he justly criticises. In this branch of education, as in all others, there are matters amiss which are an ever-present source of concern to school authorities until corrected. The evils referred to have been found to exist in many places, but in *all* places, Georgia included, strenuous efforts are constantly made to eradicate them. The decision in this case may be decisive of issues involving many colleges, and should not be rested upon such trivial matters as temporary abuses, which the State authorities are everywhere trying to remove, and in many States

have succeeded in correcting. I submit in Appendix E a few of the more pertinent rules of the Intercollegiate Conference, consisting of the schools above listed, as the best evidence of the high standards participants in these contests must attain. The printed volume cited is Rules, Regulations and Opinions of the Intercollegiate Conference of Faculty Representatives, Revised 1937, Athens Press, Iowa City, Iowa.

Those who have certain types of work to offer when the young man is through, other things being reasonably equal, would normally be expected to give preference to the man who was active in the competitive athletic contest. This is the current experience of the universities. We do not know what the record shows in the case of Georgia, as we have not seen it, but it is common knowledge—the Court may therefore notice it—that schools and even commercial enterprises favor, often specifically ask for, the letter man, that is, one who has participated in the intercollegiate contests, such as football, and the like. Nothing is more valuable in preparing a man to meet requirements for positions after graduation from the School or Department of Physical Education, than varsity football, basketball, track, swimming, baseball and wrestling. School principals and superintendents who deal with school boards, appreciate the fact that their athletic department is the public relations department of their school.

For a high opinion upon the value of competitive athletics from a source of unquestioned authority, I

refer the Court to Appendix C of this brief, where we have inserted a quotation from H. O. Crisler, of Princeton University, reproduced from the Research Quarterly of the American Physical Education Association.

Many authorities could be cited to show that education has numerous phases and that ideas regarding education, while many and varied, hold to certain fundamental tenets. One of these tenets is that the individual must be adapted to his environment, that he must be given certain training with which to better meet those conditions of life itself.

The seven cardinal principles of education are principles which attempt to meet all conceivable situations in society. Upon examination we find at least two of the seven principles have a direct concern with that phase of education which we have come to call athletics. These two principles are health and worthy use of leisure. See Appendix B.

Health and athletics have much in common. A well balanced individual must possess "a sound mind in a sound body." There are different ways to acquire a sound body, but the most effective, because it combines the values of physical exercise with the joys of sport and competition, is by participating in athletics. Hence, all phases of education, primary, secondary and higher, have conceived it one of their normal and important functions to provide facilities for and opportunities to participate in athletics.

The principle of worthy use of leisure and its connection with the field of athletics is one of tremendous social significance. We are, today, just beginning a realization of the consequences of a greatly augmented leisure. Life until a very few years ago seems to have consisted mainly in work. Due to changes in our economic life we find ourselves with a greatly shortened work day and week, and faced with a possibility of a considerably increased reduction from what we already have. "Idle hands breed mischief." We know that the problem of juvenile delinquency, crime and subversive political movements all have their roots in leisure which is not being properly used.

Athletics can and do play a major role in the leisure time problem. By encouraging participation in athletics, we occupy idle minds and body, recreate the individual so that he goes back to work with refreshed point of view, give our people the pleasure of enjoying games of skill and strength, carry them away from the cares and troubles of their every day existence. The public contests afford a fine opportunity for the student body to spend half a day—really a day—of leisure in wholesome surroundings.

It can be fairly stated too that athletics contribute toward the realization of two of the other principles of education, namely, citizenship and character. Citizenship is based upon the ability of an individual to fit into his particular society, to work, and to give and take with others. The athlete is trained in many of

these characteristics. While it is recognized that the training of character must be a continuous process, yet athletics is one of the few branches of education which has always undertaken its obligations in this respect. Sportsmanship and clean play are among its fundamentals.

Dr. Lotus D. Coffman, distinguished educator and President of the University of Minnesota, in speaking of the Minnesota athletic program, said:

> "He will discover that the athletic work is closely integrated with the teacher training courses, that the program is designed to give sound physical training to all who wish it (and in two units of the University, it is required), that intramural sports loom large, considering the numbers that participate, and lastly that the intercollegiate contests are part of a well-conceived and well-rounded athletic program."

Physical Education and Athletics for Men, University of Minnesota, 1937-1938, p. xiv.

Such is the view of many of our best known educators. Should the Courts reverse their judgment?

We think the educational value of the football and other commonly known public athletic contests is clear beyond serious controversy and that this Court should not overrule the judgment of the State authorities in this matter.

V

Some Points Concerning the Dissent in the Circuit Court of Appeals

The dissenting judge is an able jurist and the

rhetoric of his opinion is of the highest order. Respectfully we suggest he takes too narrow a view of the matter before him. He concerns himself solely with football, and he cannot envisage "the din and delight, the struggle and stress" as an "essential part of education" and, therefore, holds it not a governmental function. The dissent fails, it seems to us, in the very matter for which the author chides the writer of the majority opinion. Judge Hutcheson, speaking of his colleague's opinion, says,

> "With deference, he has not pointed, nor do I think he can point, to any practice, *precedent* or *principle* upon the basis of which it can be successfully maintained that the conduct of *intercollegiate football* games *for profit,* as is now the case in the football season, may be legitimately said to be a governmental function * * * * least of all a *function of higher education.*"

We refer to Appendix A, B, C, D and E, and main portions of this brief, in refutation of the points we have emphasized.

The dissent is notably free from close analysis of the legal question before the Court, or a searching examination of the facts with particular reference to educational theory and practice. Although all public competitive contests are necessarily involved, the author concerns himself only with the spectacular aspects of a football game. The opinion makes no mention of and therefore makes no attempt to explain

away the commonly acknowledged sound aspects of the public competitive athletic contest, including football games. It must be borne in mind that the tax challenged in this case is equally applicable to every competitive contest, whether football, golf, basketball, tennis, track or otherwise, if the admission tax exceeds the specified amount. It is a matter of common knowledge that the spectacular aspects described in the dissenting opinion in crackling rhetoric are totally absent from substantially all the other competitions mentioned. This opinion views a narrow segment of the problem, leaving the eye blinded to the larger aspects of the situation from the educational standpoint. The author of the dissent had before his eyes and was obviously influenced by only two considerations, namely, the large receipts and the glamorous and sometimes silly aspects of a football spectacle, when viewed from the side lines by the ubiquitous man from Mars. It is submitted that neither is of controlling importance upon the fundamental point at issue.

The dissenting judge says he cannot see the distinction between a football game for which the players are hired, and the ordinary college game. That is to say, he refuses to recognize a distinction between a professional football game in which the Chicago Bears and the Detroit Lions participate for pay, the proceeds of which are used for enhancing private fortunes, and a football game between the University of Illinois and the University of Michigan, the partic-

ipants in which are all *bona fide* students of the institutions named, who cannot play upon the teams unless they have achieved at least a minimum scholastic average, and who meet stringent requirements of health, character and intelligence, but receive no compensation whatsoever for what they do and the proceeds of which games are used to maintain general athletics at the institutions described. In the former case the participants appear solely for profit to themselves and others and are selected with that in view; in the latter case the contest represents the culminating point towards which the ambitions of these and other young men have been directed for years, and in the hope of attaining which they have deliberately sought not only high scholarship standards, but cultivated general excellence in every form of athletics. This contest, in which it is deemed a signal honor to participate, is precisely analogous to the intercollegiate debating contest towards which the members of the classes in English and in speech, and the members of the college debating societies, look as the ultimate honor as well as proof of skill. It is submitted that the distinction between the two types of football games is too obvious for debate. It is as plain as the difference between a college debate on the constitutionality and merits of the National Labor Relations Act and opposing arguments of paid counsel on the same act before this Court. There is probably some profit in the latter, while we know there is none in the former.

The dissent says the governmental immunity from taxation cannot reasonably be extended to "public exhibitions of the prowess of college football teams." Why not? *He* does not say. When the author of this dissent says that these exhibitions have as little connection with educational functions as a football team recruited from employees of governmental agencies, it is respectfully suggested that he is indulging in fantasy. Governmental agencies may organize basketball or football teams, but these contests do not represent, it is hoped, the ultimate ambition of the employees, as participation in these competitive athletic contests represents the ultimate ambition of many a college student as far as his college career in physical education or athletics is concerned.

The sum and substance of the dissent seems to be that any kind of a competitive contest between educational institutions attended by the public and for which privilege the public pays, is no part of an educational program, is in all cases proprietary, and therefore, like any proprietary activity, subject to federal taxation. In this view the author does not have the support of informed educational opinion in the United States.

The dissent speaks of "profit" but does not refer to the very substantial expense to which institutions are subjected in staging these competitive public contests, whether football or otherwise, and that a large part of the gate receipts goes to meet that expense. The importance of the association and interrelation of col-

leges and universities and of students in different States through these contests, is entirely ignored in the dissent. Cecil Rhodes, in defining the conditions of his famous scholarship plan, was definitely appreciative of this aspect of the matter as well as of the importance of a rounded citizen. The dissent, it is respectfully submitted, is wholly reactionary in its view of education, and shows an astonishing lack of understanding of the possibilities of athletic training and of the value of the culminating point of this training in the public competitive contest.

There is no profit, in the usual business or commercial sense, in any public competitive athletic contest, under the Georgia System, or elsewhere. The question of profit or loss has nothing to do with the problem whether these contests are properly a part of the educational program and, therefore, not proprietary. It is the *nature* of the activity that controls. This was conceded by counsel for the government in the oral argument in this Court of the case of Brush v. Commissioner, supra. In some years there is a surplus of receipts over expenses, which is, as is commonly known, turned back into the school fund and used for the maintenance of athletics and physical education. This surplus cannot, upon principles heretofore accepted as controlling, be burdened by a Federal tax. In Commissioner v. Ten Eyck, 76 Fed. (2d) 515, 519, the Circuit Court of Appeals for the Second Circuit said:

> "Even if the revenues were sufficient to pay back all the outlay of the State and the cities of the Port District for the construction of the port's facilities, the amounts over and above would go back into the treasuries of the cities for the reduction of taxes."

The common criticism of the football game centers largely around the behavior of the crowd. On this point, the dissent offers little that is new. True, the crowd comes together for no serious purpose and is in a holiday mood. Crowds do not always behave rationally, whether they have assembled to overthrow a government or enjoy themselves at an athletic competition. The writers of this brief have seen football crowds in all their irrational abandon; they have also seen the national conventions of the major political parties in the United States in action where the behavior of the delegates, when viewed from the detached viewpoint of the totally collected outsider, more closely resembled a free-for-all in a lunatic asylum than the supposedly serious business of nominating a candidate for President. Yet, I do not suppose that any one, whose opinion is worth a second thought, would deny that these conventions are necessary and proper adjuncts of representative government. The behavior of the crowd at a football game has little bearing upon the value of the contest to the participants or the student body.

We see debating teams from contending schools.

Young men reason strenuously and as best they can, in behalf of propositions in which, it may be, they do not believe; and the assembled crowd enjoys the evening—indeed, sometimes becomes noisy and unruly. The young debaters, like the young participants in the athletic contest, are not responsible for the behavior of the audience, for to them the occasion is serious because it represents the culminating test of the skill they have been cultivating, in their respective field of interest, for several years.

All of which simmers down to the point that the *spectacle* itself has very little, if anything, to do with the value of the contest *to the participants or the young students whose endeavors have been in the direction of winning a place on the teams;* and it is from *their* standpoint that this Court should consider the question of the propriety of including the public competitive contest in the State's educational program. In Bartels v. State of Iowa, 262 U.S. 404, Justice Holmes stated the proper criterion in concise language, when he said:

> " * * * * * it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried."

The most that can be said is that the competitive contest divides opinion.

VI

The Non-discriminatory Tax Doctrine

Recently it has become fashionable, in an effort to whittle to imperceptible size the doctrine of inter-governmental tax immunity, to urge that a tax upon persons who contract with the Federal government, when assessed in the same manner as such taxes are assessed on such persons, or others similarly situated, then they deal with private persons, is non-discriminatory and should, therefore, be allowed. The adjective is deceptively simple and appealing in its superficial connotation, but when it is sought to make it the keystone of new doctrines of constitutional law, legal logic demands something more than plausibility of appearance or of sound. *The concept, if accepted in its literal latitude, as sometimes currently advanced and notably by Judge Hutcheson in his dissent, would permit the Federal government to tax directly the instrumentalities of the State itself, whether used in its sovereign governmental or in its proprietary capacity.* This theory, if loosely applied, is bound to involve ultimately the complete annihilation of the essential doctrine of dual-sovereignty, and there is implicit in it an abandonment of the heretofore accepted distinctions between governmental and proprietary functions. This result may or may not be desirable; we do not stop to argue that momentous question. We merely point out the inevitable consequences of the sanction of a new theory in our

constitutional system, which, in a limited and we believe wholly proper sphere, has received some countenance in this Court.

It is submitted that this criterion (non-discriminatory), if such it can be called, inevitably leads to the consequences suggested above. To illustrate: A non-discriminatory tax by a State on the income from securities, including therein federal bonds, is *directly* paid by the private owner, but as surely the *terms* on which the bonds sell are less advantageous than they otherwise would be, *by the amount of the tax,* or more. This every bond house and every experienced business man clearly understands. The tax is, therefore, paid by the government, if we look upon the realities with intellectual honesty. It may be that there should be no such exemption. That is a question of policy. The point I emphasize is that honesty and clear thinking, under the present Constitution, cannot sanction such a tax, on the theory that the government does not pay it in fact, although the tax statute may be so framed as to be wholly non-discriminatory.

Another illustration is the salaries of State officers and employees. To date they have been uniformly held immune from Federal tax. Yet the *individual pays* the tax under a general law taxing such income. We know, nevertheless, that salaries *must* be and are fixed with some regard for every day realities, such as the cost of living, and that an increase in this cost is sure *ultimately* to be paid by the government in the

form of increased salaries. The criterion is specious and unsound.

This Court reviewed many decisions in the recent case of Helvering v. Mountain Producers Corp., supra. It will be assumed, not only because of a well established principle, but because of the tremendous importance of the doctrine of immunity from the standpoint of the sovereignty of the States, that certain general language used in this decision will be read with close regard to the factual situation before the Court. The question was whether a corporation was subject to a federal income tax with respect to the amount of income received under a deed of trust to a certain corporation, executed by a lessee of State lands producing oil and gas. The question of the taxability of the salaries of State officers or employees, or of income, fees or collections of the States, was not involved. After discussing prior decisions, the Court said:

> "These decisions and a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gain because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect and, where it merely appears that one operating under a

> government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote."

The language is broad enough, taken apart from the facts, to support the view that the *salaries* of *State officers* and *employees* are taxable by the Federal government, a result so revolutionary in its effect upon the sovereignty of the States, and so clearly contrary to a long line of prior decisions, that it is obvious this Court intended to announce no such doctrine. Yet it will later be urged by someone somewhere that such employees work under "a government contract" of employment, and this broad language will be invoked in support of a view this Court did not intend to advance, but will be asked to confirm.

Whether the views of the dissenting judge upon the wisdom of the *policy* of tax immunity influenced his judgment upon the law in the case, we do not know. If they did, we have no quarrel with him on that score. The late Justice Holmes said more than once that the courts legislated, and having been on both sides of the bar of justice, we are bound to agree that this is so. With the "test" of the validity of a claim for immunity from tax, suggested by Judge Hutcheson, whether viewed as a legislative or judicial proposal, however, we cannot agree. He says, after

stating his personal opposition to the immunity doctrine, that the

> "test * * * * should be whether the taxing statute discriminates against the government affected, and in favor of other taxpayers."

If the "non-discriminatory" tax doctrine means what Judge Hutcheson thinks it does, as evidenced by the above quoted excerpt, it is demonstrable that he proposed the total destruction of the dual principle, with a grant to the Federal government of the power to tax *State officers* upon their salaries, as well as the income of *each* State, from *whatever* source, on exactly the same basis as it *taxes* the incomes of *private citizens*. Such a tax on State income would not "discriminate" against the State. The State, of course, cannot discriminate against any citizen and tax him upon a basis different from that of other persons in the same class. The "test" suggested is no test, but the rule necessarily results from an abolition of the tax immunity—an abolition to which, we are sure, this Court will not consider giving judicial sanction without the fullest opportunity to every State in the Union to be heard against it and its revolutionary consequences.

How would this "non-discriminatory" rule, as Judge Hutcheson phrases it, work if applied to the States? It would follow unavoidably that *every* activity in which the State might engage would become taxable by the United States—just as this Court said of the liquor business in South Carolina v. United

States, supra. The federal government could require a license of certain or of *all* State and municipal employees; and it could require them to pay the usual income tax. It could levy an income tax upon all "corporations" from whatever source derived, and include in the definition of the term *corporation*, "the State and all political subdivisions," or it could classify corporations as public and private and assess different rates upon the members of each class. Such a tax would not be "discriminatory" in any legal or commonly accepted sense. It seems to us that the *entire principle* of immunity must be preserved to the States if the States and the nation are to survive and live together in mutual confidence and respect.

Will the new doctrine abrogate McCulloch v. Maryland, as well as Collector v. Day? Chief Justice Marshall, in the former case, was concerned only with the supremacy of the Federal Government, while in the latter this Court gave the States the benefit of Marshall's principle. Suppose the answer be *yes*, what would the results be? The Federal Government has expanded its activities into *every* State in the Union and gone into anything from vast power projects to local poor relief. Let us consider the power projects alone. Where the State tax is calculated on an *ad valorem* basis, certain States could collect from the Federal Government virtually enough revenue to make the tax on *private property* owners *nominal*. Imagine *forty-eight* States levying *"non-discriminatory"* taxes on the Federal Government, and the "ex-

panding needs of * * * * the nation" for more revenue would require the advocates of this theory to find sources much more lucrative than the schools and a few football games to stave off complete and ignominious bankruptcy. The plain truth is that the *whole principle* of *immunity* must be preserved to the Federal Government as well as to the States if that government is to survive, as Marshall demonstrated.

The "non-discriminatory tax" doctrine is a menace to State and national security, unless rigidly limited to the type of factual situations disclosed in James v. Dravo Co., ____U.S.____, 58 S. Ct. 208, and Helvering v. Mountain Producers Corp., supra. Extended beyond the factual situations there presented—really cases of independent contractors and not of State officers or employees—the doctrine becomes unsafe. As stated in the dissent, and as often glibly set forth by advocates, it would destroy the dual principle. *The respective rights and immunities of the Federal and State governments, the fundamentals of which are outlined in McCulloch v. Maryland and Collector v. Day, can and must be saved by insisting, as a minimum, that the exactions of one government shall not fall directly upon or burden the instrumentalities of the other, or discriminate against it.* Widened beyond the foregoing very brief statement, the doctrine is replete with danger and leads to the rejection of underlying principles essential to the maintenance of the essence of our present system. The facts in the instant case do not warrant the application of the rule

in any case heretofore decided in this Court, without extension beyond the limits of safety as far as our dual system is concerned.

VII

The Tax is a Direct Burden on the State of Georgia

The statute purports to levy this tax on the admission and requires the purchaser of the ticket to pay it. This, upon analysis, hampers the activities of the State in the execution of its work in connection with education. Let us instance a commonly known, useful, but not glamorous educational enterprise, the State Fair. Generally, the States charge admission, and on this the Congress could levy a tax if the Fair were not regarded as a function of the State government. Assume a ten per cent tax on admissions averaging 75 cents, and five persons to a family—a figure too low. The increased cost to the average family would be at least forty cents. A small sum—to the members of this Court and the authors of this brief—when viewed abstractly, but when we note the average income of the great *majority* of our people, an addition of fifty cents or seventy-five cents to the budget means more often than not to go without. Anyone who has had some concrete experience with the economic circumstances of large masses of our population understands this. Such a tax, then, would force the State to choose between the alternatives of *reducing* the *admission*, or of *denying* the *educational opportunities* of the fair to large numbers of the people.

Consider, again, the tax on admissions to the athletic contests. The recreational value, the sound use of leisure, incident to attendance upon the competition by non-participating students is not disputable. Everybody in any way connected with our State universities knows that hundreds of students go through college on a "shoestring"; that college authorities are constantly on the alert to discover cases of students who are undernourished and inadequately clothed because of poverty; and that to this marginal group of worthy and ambitious students the sum of *ten cents* measures the maximum they can afford to pay for perhaps two of the three meals a day—many go without lunch, trying to exist on a ten cent breakfast. These are matters of cold and cruel fact, commonly known in the educational world. To these young men and women ten cents added to a ticket—they cannot afford more than one event now and then—means, again, going without. The State, the institution, must choose between the alternatives of reducing the price and that of denying the recreational value of this use of leisure time to hundreds of its students. This Court can see, we are sure, that the burden of this tax, in the *circumstances*, falls directly upon a State activity or enterprise—is really a tax on the State, forcing it to carry on a governmental function at increased cost, or with less value to the people of the State chiefly concerned.

VIII

A Substantial Burden is Laid upon the State of Georgia without Its Consent

Should this Court hold that the admissions tax is not a burden on the State in its governmental capacity, or that the incidence of the tax is such as to be at most no more than an indirect and nominal burden, nevertheless the Federal Government cannot prevail because it is attempting to force the State of Georgia, without its consent, to serve as tax collector in its behalf. This is a real, not a fancied burden, and if the attempt be sustained by this Court, gives rise to implications of the most serious import. On this point Kentucky v. Dennison, 24 How. 66, is conclusive. There this Court held that Congress could not enforce a "duty of the executive" of a State to return a fugitive slave and said, if this could be done, Congress could disable this State officer "from performing his obligations to the State."

To collect this admissions tax from tens of thousands of persons requires that the State set up an elaborate and *costly* system of book and account keeping and of auditing. This is obvious. If the Federal Government can force the State to collect this tax, it can force it to collect the income tax, the Social Security tax, and every excise tax originating within its borders. The burden thus *imposable* would, in

the case of the economically weaker States, in some cases, at least, be too heavy to be borne. This is so plainly a violation of the principle of Collector v. Day and later cases, that no more time or space will be devoted to a discussion of the point. The Federal Government cannot embarrass "the lawful action" of the States (Railroad Co. v. Peniston, 18 Wall. 5), or in *any form* lay substantial burdens directly upon them.

Respectfully submitted.

April 20, 1938.

OTTO KERNER
Attorney General of Illinois

SVEINBJORN JOHNSON
Special Assistant to the Attorney General

APPENDIX A

REGULATIONS OF THE COMMISSIONER OF EDUCATION GOVERNING HEALTH AND PHYSICAL EDUCATION

Approved by the Regents of The University of the State of New York, at their meeting on July 30, 1937.

Appendix C to Journal of Regents Meeting, July 30, 1937

. . . . . .

ARTICLE V

PHYSICAL EDUCATION

Provisions for physical education or training

1 *Course of instruction*

The physical education or training program as required by law shall include instruction in the following types of activities in sufficient variety to meet individual pupil capacities, interests and needs: (1) mimetics; (2) rhythms and dances; (3) games; (4) calisthenics; (5) athletics; (6) self-testing stunts; (7) marching tactics; (8) dual combat; (9) gymnastics; (10) swimming where facilities are available; (11) and miscellaneous physical and recreational activities including winter sports

. . . . . .

5 *Athletic activities*

Effective September 1, 1938, athletic participation in all schools shall conform to the following regulations:

It shall be the duty of trustees and boards of education

a To permit no athletic team to represent a school except in conformance with the regulations

b To permit no postseason games or postseason tournaments, other than those conducted by school authorities in accordance with approved standards

c To prevent any individual or team representing a school under its jurisdiction from participating in a game or tournament which is not approved

d To insure satisfactory financial support for its program

e To approve all traveling of individuals of teams under their jurisdiction

f To maintain an equitable division of facilities between boys and girls

g To give primary consideration to the well-being of individual boys and girls in the conduct of games and sports

h To sacrifice no individual for the sake of winning events

i To conduct all activities under adequate safety provisions

j To equalize in so far as possible the powers of opponents in individual and group athletic competitions

k To provide adequate health examinations before participation in strenuous activity and periodically throughout the season, and to permit no pupil to participate in such activity without the approval of the school medical officer

l To make athletic activities an articulate part of the physical education program under the supervision of the professionally trained physical education staff

m To conduct all girls' athletic activities wherever possible under the immediate supervision of a woman physical education teacher

n To limit the girls' athletic program to club activities, intramural games, play days and approved invitation activities and to conduct all such activities for girls under girls' rules with women acting as referees, umpires or officials

o To require interschool athletic activities for boys, grades 9 to 12 inclusive, to be conducted in accordance with the following minimum standards:

. . . . . .

(4) *Extent of participation*

Football. Interschool competition in football shall be limited to a maximum of seven games a season. At least three weeks of training shall precede the first game. No game shall be played with college freshmen. All organized team practice and games shall be limited to the period between September 1st and December 1st. Interschool competition in football shall be permitted only in those schools which have 20 or more boys physically fit and eligible for participation. Competition shall be limited to boys enrolled in grades 9 through 12.

APPENDIX B

Cardinal Principles of Secondary Education, published by the Department of Interior, Bureau of Education, Bulletin 1918, No. 35.

"A report of the Commission on reorganization of secondary education appointed by the National Education Association main objectives of education. The Commission . . . . regards the following as the main objectives of education.

1. Health
2. Command of the fundamental processes
3. Worthy home membership
4. Vocation
5. Citizenship
6. Worthy use of leisure
7. Ethical character.*

These objectives apply to all education.

---

*In education the above list of objectives are known as seven cardinal principles of education and are universally applied.

APPENDIX C

The Educational Implications of Intercollegiate Football by H. O. Crisler, Professor of Physical Education and Head Football Coach, Princeton University, from Research Quarterly of the American Physical Education Association, Vol. IV, March 1933, No. 1.

"In one individual the fifty or more instincts have different degrees of development. It is the duty of an educator to aid a boy in bringing all of his emotions to a normal, functional capacity. I presume our emotions are the most vital generative influence at the root of our behavior and yet very little effort is made to direct and guide them in the ordinary college subjects. It was some fifteen years ago that Dr. Joseph E. Raycroft invited attention to the strong emotional appeal in athletics and suggested that in football boys have their emotions trained and controlled, and consequently, 'the place and function of competitive athletics in an educational institution is much more important than commonly realized.' He further maintained that 'Participation in sports and games furnished the principle if not only the practical training in ethics that exists in our modern educational system.' So far as conventional instruction goes, there is slight appeal to the emotions—so slight in fact as to lead one to believe they are not a part of our mental equipment. It is difficult to find in any class room, exercises for the deep rooted passions that control our behavior in hate, desire, fear, anger, affection, joy, sympathy, courage, sorrow, or for the emotional experiences in our human conduct which have to do with community of effort, loyalty, sacrifice, risk, sense of fairness, rivalry, or self assertion. They are not without abundant display in the motor activity of football and the more direct the expression between emotion and motor action the more enriched is the educational experience. . . . .

"Intercollegiate football furnishes the splendid laboratory for emotional self mastery. In this game, as in many life situations, the emotions are the moving forces among men and through them of states and all society. Reason has very little to do with human action. Reason is simply a method of comparing and appraising, it is always used to justify what the emotions demand. . . . .

"Perhaps the most vulnerable point in our education system is the weakness in the very vital manner of training and harnessing our emotions. It is here that a wholesome football program is able to make a very significant contribution to the educational experience of a boy because play reverts to old foundations—to the very core of our being—and includes emotional experiences aforesaid mentioned. Athletics are practically our only hope in adequately directing emotions. Games such as football afford an opportunity to the youth of our nation to release such physical impulses by being doers of the action and not hearers and listeners only. Certainly we have a responsibility in education to direct boys in the right expressions in individual conduct and social relation. . . . .

"In the words of Chancellor McCormick, 'Athletics collegiate, intercollegiate and communal are a good thing and are worth a considerable amount of trouble in order that they may be made the best possible. Athletics should be as legitimate as Greek and as serviceable as ethics. We should no more think of enduring athletics than we should think of enduring biology and chemistry.' "

APPENDIX D

From ATHLETIC JOURNAL, Vol. VII, June 1, 1927, No. 10, P. 1.

GENERAL PRIMARY OBJECTIVES

Intercollegiate Sport in Western Conference
Adopted by Western Conference Athletic Directors, Madison, Wis. May 27, 1927.

1. To supplement and broaden modern education.
   In order to take full advantage of the opportunities of Intercollegiate sport to this end the entire I.C. Sport program should be made a definite part of the general educational scheme.
2. To promote the all around welfare of an increased number of participants.
   Physical—health—motor skills
   Recreational—pleasure in sport
   Increased "social insight"
   Social—gain greater acceptance, good will
   Moral and spiritual
   Strengthen essential attitudes and behavior through illustration and practice.
3. To strengthen by illustration and example individual university and public conception and practice of
   (a) Sportsmanship—group, sectional, national, international.
      1. Regard for player of adversary in victory or defeat
      2. Proper balance in victory
      3. Courage in defeat
      4. Fairness of attitude
   (b) Team play
   (c) Clean, healthful living

(d) True winning spirit—tenacity, honesty of purpose
(e) Self control
(f) Self confidence
(g) Citizenship
Respect for rules of games under stress
Respect for wise discipline and authority.
(h) Fortitude and courage

4. To develop group consciousness, morale, and spirit in the sense of loyalty to the institution and to fellow members of the college community.
5. Reflect through representation the spirit of the institution.
(a) Intellectual ability and achievement
(b) Moral tone and idealism
(c) Genuine sportsmanship through behavior and conduct.

SECONDARY OBJECTIVES

Of Intercollegiate Athletics for Western Conference

1. To serve as the peak of an all inclusive physical educational pyramid in opportunity for specialization and superior achievement.
2. To improve mental health for players and spectators by supplying wholesome absorbing interest.
3. To foster wholesome stimulating recreational opportunity for students, faculty, alumni and general public.
4. To provide opportunity for legitimate physical expression of "animal spirits."
5. To further the educational viewpoint and needs by securing and maintaining active interest of alumni and general public in the educational institutions through the field of greatest common interest and appeal.

6. To provide funds for adequate sports program for the entire student body.
   (a) Non-self-supporting competitive sports
   (b) Intramural sports—recreational activities
   (c) General physical education
   (d) Research in the field of physical education

WESTERN CONFERENCE

BRIEF CODE OF OBJECTIVES FOR I-C SPORT

1. To supplement and broaden modern education.
2. To promote the all around welfare of an increased number of participants.
3. To strengthen individual, university and public conception and practice of—
   Sportsmanship
   Physical well being
   Tenacity
   Citizenship
4. To develop group morale and loyalty.
5. To reflect through representation the tone of the institution.

Respectfully submitted,

J. L. GRIFFITH
E. E. WIEMAN
Dr. J. W. WILCE, *Chairman.*

APPENDIX E

RULES, REGULATIONS AND OPINIONS OF THE INTERCOLLEGIATE CONFERENCE OF FACULTY REPRESENTATIVES,

Revised 1937.

RULES OF ELIGIBILITY

Rule 1. Residence and Curriculum

Section 1. To become eligible to represent any institution in intercollegiate athletics a student must

(a) have been in residence therein one academic year.

(b) have completed therein one full year of work in addition to meeting the entrance requirements of the College of Liberal Arts of his institution or their equivalent.

(c) be bona fide matriculated and regularly enrolled as a candidate for a degree.

(d) be doing full work as defined by the regulations of the school or college, in which he is enrolled. * * * *

Section 2.

(a) In no case shall any student who has ever competed in interscholastic or intercollegiate athletics as a member of any other school or college team be permitted to participate in any intercollegiate athletic event as a representative of any Conference institution until after the close of the succeeding season devoted to the sport in which he last participated as a member of such other school or college team.

(b) In no case shall any student be permitted to take part in any intercollegiate contest until after his matriculation there shall have elapsed one full calendar year.

Section 3. In case a student leaves an institution of college grade and thereafter enters a Conference University and at the time of leaving the first institution he was delinquent in any of his studies or he was not otherwise in good standing, in order to become eligible he must be in residence two academic years as well as otherwise satisfying the requirements for eligibility. In no case shall any such transferring student be permitted to take part in any intercollegiate contest as a representative of the institution to which he transfers until, after his matriculation therein, there shall have elapsed two full calendar years.

Section 4. In case any member of the coaching staff of a Conference university shall have come to such institution after service as a member of the coaching or athletic staff of any other college, any student who has matriculated at such other college during the period of such coach's services there and who withdrew therefrom and thereafter matriculated at the Conference institution to which such coach transferred shall be ineligible for intercollegiate athletics.

Rule 2. Undergraduates

No student shall be eligible who

(a) has graduated from any school, college or department of a college or university, or

(b) has prolonged his undergraduate course for the purpose of extending his period of eligibility, or

(c) has sufficient credit so as to be eligible for graduation in the school or college in which he is enrolled.

Rule 3. Delinquency in Studies

Section 1. No student shall be permitted to participate in any intercollegiate contest who is found by the faculty to be delinquent in any of his studies.

Section 2. A student becoming ineligible through delinquency in studies may regain his eligibility by

(a) removing such delinquencies either (1) by thereafter repeating the courses in which the delinquencies were incurred and earning passing grades therein, or (2) by reexamination or otherwise, by which in accordance with college rules and practices the delinquency is erased, or (3) by thereafter taking and passing (except in the case of courses required for graduation) other courses of equal hours for which substitution permission has been granted, or

(b) thereafter doing one full year of work; to regain eligibility under (b) however, the student must have removed any delinquency which his college requires to be removed as a prerequisite to graduation. (Dec. 4, 1931)

Section 3. A student who has twice withdrawn from school with delinquencies may not regain eligibility. * * * *

. . . . . .

Rule 6. Compensation and Prizes

Section 1. No student shall participate in any intercollegiate contest who has ever used, or is using, his knowledge of athletics or his athletic or gymnastic skill for gain; (and this is also interpreted to cover the writing of single or syndicated articles of a technical nature); or who has taken part in any athletic contest in which a money prize was offered, regardless of the disposition made of the same. In case of minor infractions, prior to entering college, the Conference will entertain applications for reinstatement. * * * *

Section 4. No scholarships, loans or remissions of tuition shall be awarded on the basis of athletic skill, and no financial aid shall be given to students by individuals or organizations, alumni or other, with the purpose of subsidizing them as athletes or of promoting the athletic success of a particular University. (See also *General Regulation XIX*).

Rule 7. Outside Competition

Section 1. A student who after matriculation in any college engages in any athletic contest as a representative of any organization primarily athletic in character (as for example an athletic club), shall thereafter be ineligible to represent a Conference institution.

Section 2.

(a) A student who, after matriculation in any college, engages in any athletic contest during term time, other than the Summer Session or Quarter, as a representative of any person or organization other than his college, shall thereafter be ineligible to represent a Conference institution. (May 20, 1932)

. . . . . .

Rule 9. Athletes' Statement

Athletic Committees shall require each candidate for an intercollegiate athletic team to subscribe to a statement (standard blanks for the purpose to be furnished by the Conference) that he is eligible under the letter and spirit of the rules adopted.

Falsification of this blank will lead to a recommendation to the proper university authorities that disciplinary action be taken. (May 22, 1936)

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 25 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,
PETITIONER,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

MOTION OF UNIVERSITY OF SOUTH CAROLINA, CLEMSON COLLEGE AND THE CITADEL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE

E. W. MULLINS,
HAROLD MAJOR,
D. W. ROBINSON, JR.,
JAMES F. DREHER,
Counsel for University of South Carolina, Clemson College and The Citadel, as *Amici Curiae*.

Petition Filed

BLANK

PAGE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,
PETITIONER,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May it please the Court:

The undersigned as counsel for the University of South Carolina, Clemson College and The Citadel, respectfully move this Honorable Court for leave to file the accompanying brief in this cause as *amici curiae*.

E. W. MULLINS,
HAROLD MAJOR,
D. W. ROBINSON, JR.,
JAMES F. DREHER,
Counsel for University of South Carolina, Clemson College and The Citadel, as *Amici Curiae*.

BLANK

PAGE

INDEX

	PAGE
Preliminary Statement	5
Argument	6
Conclusion	11

TABLE OF CASES

PAGE

Brush v. Commissioner, 300 U. S., 352 10

German Gymnastic Assoc. v. City of Louisville, 117 Ky., 958, 80 S. W., 201 8

Helvering v. Mountain Producers Corp., 82 L. Ed., 615. 7

Helvering v. Therrell, 82 L. Ed., 541 7

Indian Motorcycle Co. v. United States, 283 U. S., 570 .....6, 11

James v. Dravo Contracting Co., 82 L. Ed., 125 .....6, 7

Kentucky v. Dennison, 24 How., 66, 16 L. Ed., 717 11

McCulloch v. Maryland, 4 Wheat, 316, 4 L. Ed., 579..... 6

Mokovick v. School District, 177 Minn., 446, 225 N. W., 292 8

Panhandle Oil Co. v. Knox, 277 U. S., 218 11

People v. Graves, 299 U. S., 401 10

School District v. Superior Court, 69 Wash., 189, 124 Pac., 484 8

Spencer v. School District, 121 Ore., 511, 254 Pac., 357.. 8

South Carolina v. United States, 199 U. S., 437 7

Weston v. Charleston, 2 Pet., 449, 7 L. Ed., 481 6

Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,
PETITIONER,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

BRIEF OF UNIVERSITY OF SOUTH CAROLINA, CLEMSON COLLEGE AND THE CITADEL AS AMICI CURIAE

PRELIMINARY STATEMENT

The institutions submitting this brief as *amici curiae* are State institutions of higher learning of the State of South Carolina and have an interest in the case now before this Court. Although the relation between the Athletic Departments of these institutions and the governing bodies of the schools and the relation between the governing bodies of the schools and the State Government are different in some particulars from the comparable relations existing in our sister State of Georgia, our situation is in the main so similar to that presented by the record before the Court as to permit us to adopt in its entirety the legal position assumed in this matter of Federal taxation on admissions to inter-collegiate football games by appellees. We of course

have no interest in the procedural questions presented in this writ of *certiorari,* but the determination of the primary question as to whether the Federal Government can impose and collect taxes on admissions charged to athletic contests by State institutions is of vital interest to us. If this Court should reverse the holding below and require the collection and payment of these taxes by the institutions in Georgia, we should be compelled to place ourselves within the terms of the Federal Revenue Act and pay similar admission taxes to the Collector of Internal Revenue in respect to athletic exhibitions sponsored by the South Carolina schools. We, therefore, deem it proper that we add our voice to that of the officials of the Georgia institutions in urging upon this Court the invalidity of the Federal taxation as here applied.

ARGUMENT

It is not our purpose to attempt any lengthy discussion of the principles and precedents pertaining to intergovernmental tax immunity, admittedly one of the most intricate, delicate and involved of all problems in the field of constitutional law. This principle, necessarily implied under the Constitution in order to maintain essential freedom of our dual governments in performing their functions, has been landmarked by such cases as *McCulloch v. Maryland,* 4 Wheat, 316, 4 L. Ed., 579; *Weston v. Charleston,* 2 Pet., 449, 7 L. Ed., 481, *Indian Motorcycle Co. v. United States,* 283 U. S., 570, *Rogers v. Graves,* 299 U. S., 401, and *James v. Dravo Contracting Co.,* 82 L. Ed., 125. The situations calling for application of this principle have been varied and its corollaries are therefore numerous; but we think the present case comes within the most basic statement of the principle, *i. e.* that no state can by taxation burden or impede the United States in the exercise of its delegated powers and that the United States cannot by taxation burden or impede any state in the exercise of its governmental

powers. We have carefully examined the opinions of this Court in *James v. Dravo Contracting Co., supra; Helvering v. Mountain Producers Corp.,* 82 L. Ed., 615 and *Helvering v. Therrell,* 82 L. Ed., 541, decisions considered, and unquestionably properly so, as definitely limiting certain phases of the tax immunity that have hitherto been indulged in under the former and broader decision. The limitations of none of these recent decisions have, we believe, any application to the question now presented. In all of them the principle is inherent that any taxation by one of our two governmental systems burdening the exercise of governmental functions by the other cannot be sustained.

As we see it the primary question involved in the case at bar is one simple in statement and straightforward in analysis. It is whether the activity of a state educational institution in conducting athletic contests to which admissions are sold is a governmental activity or a private activity. If the Georgia colleges and the South Carolina colleges are, in taking part in intercollegiate sports events and making charges to the public for witnessing such events, carrying out a part of a program which is essentially governmental in its nature, the Federal government cannot constitutionally levy a tax that will tend to burden such activity. On the other hand, if the officials of the Georgia colleges and the officials of the South Carolina colleges are in sponsoring such intercollegiate contests, taking part in a business venture—the business of amusing or entertaining the public—the activity is a private and proprietary one and no precept of constitutional law is offended by a Federal tax upon it. This is admitted to follow under the leading case of *South Carolina v. United States,* 199 U. S., 437.

It is our position that the former is the true legal aspect of the matter and that when the officials of the University of Georgia and Georgia Tech, as well as the officials of the State institutions of South Carolina, hold

intercollegiate football games and charge admissions therefor they are performing an integral part of a governmental function rather than a proprietary function.

Higher Education is a Governmental function. We do not believe that this proposition, the first step in a logical analysis of the question here presented, requires defense or discussion.

Athletic training is an integral part of higher education. This proposition is no longer seriously questioned in our modern society. In the opinion of most of our present day educators a healthy body and a personality tempered by sports are looked upon as prerequisites to any true development of our youth, regardless of how firm is the belief that mental development is the primary objective of our schools. There have been numerous decisions by our various State Courts as to whether athletics so come within the scope of educational activities as to make their promotion properly considered under the law as a governmental function. These cases involve liability for damages incurred while engaging in athletics (*Mokovick v. School District,* 177 Minn., 446, 225 N. W., 292; *Spencer v. School District,* 121 Ore., 511, 254 Pac., 357); the law of eminent domain as applied to the acquisition of property to be used for athletic purposes (*School District No. 56 v. Superior Court of Chelan County,* 69 Wash., 189, 124 Pac., 484); and exemption from taxation (*German Gymnastic Assoc. v. City of Louisville,* 117 Ky., 958, 80 S. W., 201). In all of them the promotion of athletics in a state educational system was held to be a governmental function.

Intercollegiate contests are an integral part of athletic training. As in perhaps all human activities, the attainment of proficiency in a sport rests upon an assurance that proficiency if attained will be acknowledged. Were there no opportunity for a young man in college to attain such proficiency in his chosen sport as to be selected on his school

team, the desire to take part in athletic activities would be greatly lessened; and were there no opportunity for the school team to demonstrate its proficiency in friendly rivalry with other colleges the desire of winning a place on such team would be equally diminished. Intercollegiate contests provide the zest for physicial development. It is true that our schools of higher education foster various and varied intramural sports, but we believe that the inspiration for all this activity, the cause *sine qua non* of its existence is competitive intercollegiate contests.

We might even say that the fact that such intercollegiate contests, particularly in the major sports, are engaged in before large gatherings of spectators, partisan in their feelings and laud in their applause, is in itself an incentive for activities in all sports.

Charging the public for admissions to athletic contests is a necessary adjunct to intercollegiate sports activities. We come now to what is perhaps the crux of the question. The Government apparently contends that although we are correct in what we have said so far and there can no successful athletic program without intercollegiate contests, the fact that the public is invited to attend such contests and is charged admission for the privilege of doing so changes what would otherwise be a proper educational function into a selling of entertainment for profit. We believe that the appellees in the case at bar have established in the record below that the charging of admissions to such contests, particularly football games, is necessary, not only to make the game of football itself, admittedly our most popular American collegiate game, self-supporting, but also to provide funds for the rest of the athletic program. It is equally true in our South Carolina schools that our general athletic activities would be so curtailed as to make them of little use were revenues from intercollegiate football games to be cut off. We think this is perhaps more true in the South than in other sections. Football is in this section

our only major sport, the only sport in which a sufficiently large number of people are interested to afford any substantial revenue at all. We, as do the Georgia schools, charge admissions to our football games so that a varied and useful athletic program can exist in our colleges, so that there can be baseball, track, basketball and all the various intramural sports, and so that there may be available facilities for some sport of which every man in college can take advantage if he so desires. We do not think that it can be said that we hold large intercollegiate contests for the purpose of providing entertainment for the public and profit to ourselves when the revenue which we derive therefrom is so necessary to the maintenance of our general athletic program. The mere fact that admissions are charged and profits sometimes made cannot have the effect of making an activity otherwise governmental, non-governmental or proprietary in nature: *People v. Graves,* 299 U. S., 401 and *Brush v. Commissioner,* 300 U. S., 352.

We have argued that physical training is a necessary part of our educational system, that intercollegiate contests are a necessary part of physical training and that the charging of admissions is a necessary part of intercollegiate contests. However, all that we need to show is that in the consideration of the State authorities in charge of our institutions of higher learning these propositions are true. Believing them to be true, they have acted upon them, and we do not believe the Federal Government can be said to be properly respecting the sovereignty of the State when it denies to the State authorities in control of our educational system the right to say what are and what are not proper activities in a program of State education.

The Government argues, and the dissenting Judge in the Circuit Court of Appeals adopted the position, that, even if the charging of admissions for intercollegiate contests is in the exercise of a governmental function, the federal tax is still collectible because it is levied not against the State institution but against the purchasers of tickets.

That if a tax by one government does tend to burden the proper governmental actions of the other, the fact that the tax is by the terms of the taxing statute to be paid by one with whom the Government deals rather than the Government itself is immaterial, is sufficiently established by the decisions of this Court in *Panhandle Oil Co. v. Knox,* 277 U. S., 218, and *Indian Motorcycle Co. v. United States,* 283 U. S., 570. Likewise, it is true that where a tax is deemed a direct levy upon a sovereign or one of its instrumentalities in respect to the operation of a governmental function there can be no regard to the extent of the burden. *Indian Motorcycle Co. v. United States, supra,* and cases cited therein.

We would apply exactly the converse of the Government's argument and say that even if the holding of athletic contests to which admissions are charged be not a proper governmental function, still the collection of Federal admission taxes is invalid if agencies of the State Government are compelled to act as tax collectors for the Federal Government. The collection of Federal taxes is certainly a Federal function and a duty of the proper Federal officers, and the burden of this collection cannot be by Federal statute placed upon State officials or agencies. *Kentucky v. Dennison,* 24 How., 66, 16 L. Ed., 717.

CONCLUSION

In conclusion we earnestly submit that when it is made to appear that officials of State institutions of higher learning consider it proper to include physical training in their program of education, and public contests for which admissions are charged in their program of athletics; the conducting of such exhibitions is established as an integral part of a governmental function and no taxation by the Federal Government which interferes with this function should be permitted. We therefore join with the Regents

of the University system of Georgia in asking that the decision below be affirmed.

Respectfully submitted,

E. W. MULLINS,
HAROLD MAJOR,
D. W. ROBINSON, JR.,
JAMES F. DREHER,
Counsel for the University of South Carolina, Clemson College and The Citadel, as *Amici Curiae.*

Stone J. p. 1.

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner,
vs.
Regents of the University System of Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The question on the merits is whether the exaction of the federal admissions tax, in respect of athletic contests in which teams representing colleges conducted by the respondent participate, unconstitutionally burdens a governmental function of the State of Georgia. The petition also challenges the respondent's ability to maintain a suit to enjoin the collection of the tax and to substitute as defendant the successor in office of the Collector originally impleaded. The court below decided all the questions involved against the petitioner.[1] Because of their importance we granted certiorari.

Section 500(a)(1) of the Revenue Act of 1926,[2] as amended by Section 711 of the Revenue Act of 1932[3] imposes "a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . . to be paid by the person paying for such admission; . . .".[4] Subsection (d) commands that the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket is sold shall be con-

[1] The defendant in the District Court was W. E. Page, the petitioner's predecessor in office. That court dismissed the bill. 10 F. Supp. 901. The Circuit Court of Appeals reversed. 81 F. (2d) 577. After answer and a hearing on the merits the District Court awarded an injunction. 18 F. Supp. 62. The Circuit Court of Appeals permitted the substitution of the petitioner for Page and affirmed the decree by a divided court. 93 F. (2d) 887.

[2] c. 27, 44 Stat. 9, 91; U. S. C. Tit. 26, §§ 940-944.

[3] c. 209, 47 Stat. 169, 271; U. S. C. Tit. 26, § 940(a)(2).

[4] Exemptions touching admissions of certain persons and all admissions to specified types of entertainment or exhibitions are not involved. Subsection (c), 47 Stat. 271.

spicuously printed, stamped, or written on the face or back of that portion of the ticket which is to be taken up by the management and imposes a penalty for failure to comply with its terms. Section 502 requires the person receiving payments for admissions to collect the tax and make return in such form as the Commissioner of Internal Revenue may prescribe by regulation. Section 1102(a)[5] imposes the duty on persons who collect the tax to keep records and render statements, under oath, and to make returns as required by the Secretary of the Treasury. Section 1114[6] (b) and (d) fixes penalties for failure to collect or pay over and subsection (e) provides for the personal liability of one collecting the admission charge and for distraint by the Collector of Internal Revenue for taxes and penalties. Section 607 of the Revenue Act of 1934[7] requires the person charged with the collection of the tax to hold the amount collected as a special fund in trust for the United States, confers the right to assess him with the amount so collected and withheld, including penalties, and, in connection with R. S. 3187,[8] authorizes the Collector of Internal Revenue to distrain therefor.

The respondent is a public corporation, created by Georgia as an instrumentality of the State, having control and management of The University of Georgia and the Georgia School of Technology. Athletics at these institutions are conducted under the respondent's authority by two corporations, the University of Georgia Athletic Association and the Georgia Tech. Athletic Association. The expense of physical education and athletic programs at each school is defrayed almost entirely from the admission charges to athletic contests and students' athletic fees collected for the purpose. During September and October 1934 football games were played at the institutions, for which admissions were charged and collected by the associations. Each ticket showed on its face the admission price, the amount of the tax, and the total of the two, and also carried the following printed notice:

"The University of Georgia [or Georgia School of Technology] being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do

[5] 44 Stat. 112; U. S. C. Tit. 26, § 960.
[6] 44 Stat. 116; U. S. C. Tit. 26, §§ 494, 856, 921.
[7] c. 277, 48 Stat. 680, 768; U. S. C. Tit. 26, Sec. 1551.
[8] U. S. C. Tit. 26, § 1580.

so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

Each association deposited the total collected as the disputed tax in a separate bank account, apart from its other funds, but made no return thereof. The Collector prepared returns for the amounts. In consequence of the associations' neglect to pay the amounts so returned, the Commissioner assessed each association in the amount shown by return made for it and certified the assessments to the Collector who made demands for payment. These were ignored and the Collector filed liens, issued warrants, and levied upon the deposit accounts. The respondent then brought suit in which it prayed a decree that, as an agency of the State performing an essential governmental function in the conduct of the games, it was immune from the tax, and sought injunctions, temporary and permanent, to restrain the Collector from proceeding further to collect the sums demanded. From a decree awarding a final injunction the Collector appealed but, pending appeal, resigned and, before the hearing, died. Over objection the Circuit Court of Appeals ordered the petitioner substituted as appellant and affirmed the decree. We are of opinion that the court below rightly decided the procedural questions but erred as to the merits.

First. If the suit was maintainable against his predecessor in office the substitution of petitioner was lawful. We are not unmindful of the principle that suits against officers to restrain action in excess of their authority or in violation of statutory or constitutional provisions are in their nature personal and that a successor in office is not privy to his predecessor in respect of the alleged wrongful conduct.[9] As a result of the inconvenience resulting from the lack of power to substitute one who succeeded to the office of an alleged offending official, to which this court has called attention,[10] Congress adopted the Act of February 13, 1925,[11] which provides:

" . . . where, during the pendency of an action, suit, or other proceding brought by or against an officer of the United

[9] Pennoyer v. McConnaughy, 140 U. S. 1, 10; United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 603-604; Philadelphia Company v. Stimson, 223 U. S. 605, 620-621; Irwin v. Wright, 258 U. S. 219, 222.

[10] See Ex parte La Prade, 289 U. S. 444, 456-459.

[11] c. 229, 43 Stat. 936, U. S. C. Tit. 28, Sec. 780.

States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, ...".

The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U. S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted.

Second. If the tax, the collection of which was threatened, constituted an inadmissible burden upon a governmental activity of the State, the circumstances disclosed render the cause one of equitable cognizance and take it out of the prohibition of R. S. 3224.[12] The respondent has long been of opinion that exaction of the tax in respect of games played under the auspices of The University of Georgia and the Georgia School of Technology constitutes an unconstitutional burden upon an essential governmental activity of Georgia. At first the respondent collected the tax as required by the Act, paid it over to the Treasury, and made claim for refund. The claim was rejected on the ground that the tax was paid by the patron of the game, and that the athletic associations and the respondent were mere collecting agents having no interest in the fund which would justify repayment to them if it had been illegally collected. Believing the basis of the Commissioner's refusal to refund was sound,[13] the respondent then resorted to the expedient of collecting the amount of the tax under the reservation printed upon the tickets.

The bill, after reciting the facts as above summarized, alleges that the statute imposes a tax upon the individuals who purchase

[12] U. S. C. Tit. 26, § 1543.

[13] Compare Shannopin Country Club *v.* Heiner, 2 F. (2d) 393; Lafayette Worsted Co. *v.* Page, 6 F. (2d) 399; Union Pac. Ry. *v.* Bowers, 33 F. (2d) 102; Wourdack *v.* Becker, 55 F. (2d) 840; but see Builders' Club *v.* United States, 14 F. Supp. 1020.

ts, but, properly construed, is inapplicable to those purchasing
ts to the football games in question. It further asserts that, in
ect of those games, neither the respondent nor the athletic as-
tions collected any tax from purchasers of admissions; that if
tatute be construed to justify the Collector in seeking to force
ondent to pay sums representing alleged taxes due from nu-
us individuals it is unconstitutional as an attempt to interfere
and control and to burden the State's educational activities
unlawfully to impose on the State government the duty of col-
ng taxes for the federal government; that the action of the
ioner in issuing warrants of distraint is either an attempt to
ct from respondent taxes alleged to be due from various in-
luals, or to impose upon the respondent penalties, criminal and
tive in nature.

he petitioner insists the bill shows the tax was in fact collected
the patrons of the games, and the allegation that no tax was
cted is a mere conclusion of law which the court should ignore;
the trial court was without jurisdiction to determine in this
for injunction whether or not taxes had been collected by
ondent; that the Revenue Act imposes no liability for the tax
the vendor of the tickets who fails to collect, although it does
se a penalty for wilful failure to collect the tax and other
lties; that, as the respondent collected the tax, it has no stand-
n its capacity as a collecting agent to deny the validity of the
tion, and, as a collecting agent, could not create a right to
t collection by the government by forcing a stipulation upon
hasers of tickets that the amount collected should belong to
agent if it were able to defeat the government; that, as such
t, respondent has no interest adverse to the United States; that
tipulation in question did not amount to an assignment of a
t purchaser's claim for refund or, if it did, the purchaser has
eby lost his right to recover the tax by reason of the prohibition
ssignment of claims against the United States embodied in
. 3477;[14] that respondent or the athletic associations would
had an adequate remedy at law for recovery of the amounts
sed against them had they paid the assessments; and finally
R. S. 3224[15] prohibits the issue of an injunction against col-
on.

J. S. C. Tit. 31, § 203.

[15] "No suit for the purpose of restraining the assessment or collection of
ax shall be maintained in any court." U. S. C. Tit. 26, § 1543.

To these contentions respondent replies that while it placed the required information on the ticket and segregated the equivalent of the tax from the proceeds of tickets sold to avoid the imposition of penalties on its personnel, the notation on the tickets shows that it did not undertake to collect and did not in fact collect the tax; that, by refusal to collect, it took itself out of the category of an agent who voluntarily acted on behalf of the government; that, while the statute places no liability upon respondent for the tax as such, it imposes upon the respondent civil and criminal penalties for refusal to collect it; that respondent is not an assignee of the claims of its patrons, but, if the tax is invalid, is owner in its own right of the entire amount paid by each purchaser; that respondent has no remedy at law because if it had paid the tax out of its own funds it could not have claimed refund of payment thus voluntarily made for its patrons' accounts; that State officials may not be required to collect an illegal tax as a condition precedent to contesting its validity; that Section 3224 has no application to this suit.

The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity.

What we have said indicates that R. S. 3224, *supra,* does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at

law.[16] This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another. The argument that no remedy need be afforded the respondent is bottomed on the assumption that it is a mere collecting agent which cannot be hurt by collecting and paying over the tax; but this argument assumes first, that respondent did in truth collect a tax and, second, that the imposition of the tax on the purchase of admissions cannot burden a state activity. This is arguing in a circle, for these are the substantial matters in controversy. We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment.

Third. We come then to the merits. For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the State government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the State authorities, and their determination is not subject to review by any branch of the federal Government; that a state acvitity does not cease to be governmental because it produces some income; that the tax is imposed directly on the State activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a State agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.

The record discloses these undisputed facts: The stadium of the University of Georgia has a seating capacity of 30,000, cost $180,000, and was paid for by borrowed money which is being repaid by the Athletic Association, whose chief source of revenue is admissions to the contests in the stadium. $158,000 of the amount bor-

[16] Miller *v.* Standard Nut Margarine Company, 284 U. S. 498, 509.

rowed has been repaid since the stadium was completed in 1929. The student enrollment is about 2400. Each student pays an annual athletic fee of $10.00 which confers the privilege of free admission to all the school's athletic events. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association from all sources for the year ending August 31, 1935, were $91,620.25 of which $71,323.27 came from admissions to football games.

The stadium of the Georgia School of Technology has a seating capacity of 29,000. It cost $275,000 and was paid for by a gift of $50,000 and from admissions charged and student fees. The enrollment is about 2,000 students each of whom pays an annual athletic fee of $7.50 which gives the privilege of free admission to all games. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association for the six months ended December 31, 1934, were $119,436.75 of which $74,168.51 came from admissions to football games.

It is evident that these exhibition enterprises are comparatively large and are the means of procuring substantial aid for the schools' programs of athletics and physical education. In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a state may withdraw the business from the field of federal taxation.

When a state embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. In *South Carolina* v. *United States*, 199 U. S. 437, it appeared that South Carolina had established dispensaries for the sale of liquor and prohibited sale by other than official dispensers. It was held that the United States could require the dispensers to take licenses and to pay license taxes under the Internal Revenue laws applicable to dealers in intoxicating liquors, and this notwithstanding the State had established the dispensary system in the valid exercise

[17] Student athletic fees are not treated as admissions subject to the tax. See Cumulative Bulletin XI-2 (July-December 1932) p. 522.

of her police power. In *Ohio* v. *Helvering,* 292 U. S. 360, it was shown that Ohio, in the exercise of the same power, had created a monopoly of the distribution and sale of intoxicating liquors through stores owned, managed, and controlled exclusively by the State. It was sought to enjoin the Commissioner of Internal Revenue and his subordinates from enforcing against the State, her officers, agents, and employes, penalties for the nonpayment of federal excises on the sale of liquor. Relief was denied and the views expressed in the *South Carolina* case were reaffirmed. In *Helvering* v. *Powers,* 293 U. S. 214, the court found that Massachusetts, in the exercise of the police power, had appointed a Board of Trustees to operate a street railway company's properties for a limited time. It was held that though the trustees were State officers, their salaries were subject to federal income tax because the State could not withdraw sources of revenue from the federal taxing power by engaging in a business which went beyond usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend.

The legislation considered in *South Carolina* v. *United States, supra,* provided for a division of the profits of the dispensary system between the State treasury and cities and counties. Thus the enterprise contributed directly to the sustenance of every governmental activity of the State. In the present instance, instead of covering the proceeds or profits of the exhibitions into the State treasury, the plan in actual operation appropriates these monies in ease of what the State deems its governmental obligation to support a system of public education. The difference in method is not significant. The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.

Under the test laid down in *Helvering* v. *Gerhardt* [decided this day] however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged.

The opinion in *South Carolina* v. *United States, supra,* at pages 454-457, points out the destruction of the federal power to tax which might result from a contrary decision.[18]

Moreover the immunity implied from the dual sovereignty recognized by the constitution does not extend to business enterprises conducted by the States for gain. As was said in *South Carolina* v. *United States, supra,* at p. 457: "Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it." Compare *Helvering* v. *Therrell,* No. 128, Oct. T. 1937. The decree is

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

---

[18] "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down." (p. 454.)

"The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty." (p. 455.) (Compare Board of Trustees *v.* United States, 289 U. S. 48, 59.)

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government." (p. 455.)

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner,
vs.
Regents of the University System of Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Reed concurs in the result.

Except for the holding that injunction is a proper remedy to test the position of the Regents, I agree with the opinion of the Court. As even a small breach in the general scheme of taxation gives an opening for the disorganization of the whole plan, it seems desirable to express dissent from the conclusion that the Regents may utilize the summary remedy of injunction, over the objection of the Government, as a means of testing the applicability of a tax law to them.

The facts set out in the opinion of the circumstances and agreement under which the money threatened to be distrained was collected make it quite clear, it seems to me, that the Regents collected tax moneys from the spectators. Any allegation in the petition to the contrary is an erroneous conclusion of law. The Collector sought to cover this money into the Treasury. Section 502(a) of the Revenue Act of 1926[1]; section 607 of the Revenue Act of 1934[2] and section 3224 of the Revised Stat-

[1] Sec. 502(a). Every person receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the princial office or place of business is located. (U. S. C., Title 26, Sec. 955, 956.)

[2] Sec. 607. Enforcement of Liability for Taxes Collected. Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid

utes[3] make it clear that no injunction will lie to restrain such action.[4]

Section 3224 was enacted in 1867 and until recent years was followed by the courts without deviation. Exceptions were made to protect taxpayers against collection of penalties.[5] In an exceptional case of "special and extraordinary" circumstances,[6] where a "valid . . . tax could by no legal possibility have been assessed against respondent . . ." this Court permitted an injunction. "Special and extraordinary" circumstances have multiplied. Here the lower court found them "demonstrated by the fact that the Regents had actually paid the tax in former years, and filed a claim for refund which was denied on the ground that they had not borne the burden of any part thereof." It may be assumed, and petitioner admits, that respondents may not pay the moneys and then sue to recover them. The fallacy underlying the opinion of the Court is the assumption that some remedy is necessary. Respondents, being merely collectors of tax moneys, are not entitled either to enjoin collection of these moneys or to pay and sue to recover them.

There is no reason why the State of Georgia should risk or ask its agents to risk penalties to determine whether this tax is collectible. Respondents would lose nothing by collecting the tax and turning it over to the United States. If they desire to stand upon their own conception of the law and refuse to collect the tax, they must take the risks of such action. Every other taxpayer or collector of admission taxes must make the same choice.

The prompt collection of revenue is essential to good government. Summary proceedings are a matter of right.[7] The Government has been sedulous to maintain a system of corrective

---

in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, Sec. 1551.)

[3] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

[4] Gouge *v.* Hart, 250 Fed. 802 (W. D. Va.), appeal dismissed, 251 U. S. 542; Ralston *v.* Heiner, 24 F. (2d) 416 (C. C. A. 3d); Calkins *v.* Smietanka, 240 Fed. 138 (N. D. Ill.); Seaman *v.* Guaranty Trust Co. of New York, 1 F. (2d) 391 (S. D. N. Y.).

[5] Lipke *v.* Lederer, 259 U. S. 557; Regal Drug Co. *v.* Wardell, 260 U. S. 386.

[6] Miller *v.* Nut Margarine Co., 284 U. S. 498.

[7] Cheatham *v.* United States, 92 U. S. 85, 88, 89.

stice.[8] Any departure from the principle of "pay first and tigate later" threatens an essential safeguard to the orderly functoning of government. Here an injunction is approved when the etitioner below had little more legitimate interest in the collection the tax than a curiosity to know whether the customers of its thletic spectacles, the real taxpayers, were constitutionally subect to such an exaction.

I am authorized to say that Mr. Justice STONE concurs in this pinion. Mr. Justice BLACK concurs in this opinion except in so far it approves the reasoning of the Court on the question of State mmunity from interference by Federal taxation.

[8] Compare Anniston Mfg. Co. *v.* Davis, 301 U. S. 337.

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner, *vs.* Regents of the University System of Georgia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Stone, concurring in the result.

Congress, by R. S. § 3224, has declared that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." While I agree with the decision of the Court on the merits, I am not persuaded that this statute does not mean what it says, or that the suit is not one to restrain collection of the tax. I can only conclude, as I did in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 511, that the statute deprived the district court of jurisdiction to entertain respondent's suit, and that the judgment should be reversed with direction that the cause be dismissed.

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner, *vs.* Regents of the University System of Georgia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Butler, dissenting.

I am of opinion that the District Court had jurisdiction.

So far as concerns the validity of the tax, the University is the State. It is an instrumentality carrying on the State's program of public education. The holding of the athletic contests in question is an integral part of that program and does not cease to be such because it produces income. The tax is imposed directly on and burdens that activity of the State. The Court assumes the facts above stated and decides the case on that basis. The tax is laid on the charge paid for admission, is to be borne by the person paying for admission and is to be collected by the State and handed over to the United States. It is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of federal taxation, its work of education to the level of selling intoxicating liquor (*South Carolina* v. *United States*, 199 U. S. 437. *Ohio* v. *Helvering*, 292 U. S. 360) operating a railway (*Helvering* v. *Powers*, 293 U. S. 214) or conducting any other commercial activity. The tax seems plainly within the rule of state immunity from federal taxation as hitherto understood and applied. I would affirm the judgment of the Circuit Court of Appeals.

Mr. Justice McReynolds concurs in this opinion.